

OPINIONS
OF THE
Corporation Counsel and
Assistants

FROM
OCTOBER 6, 1914 TO APRIL 26, 1915.

PUBLISHED BY AUTHORITY OF THE
CITY COUNCIL
OF THE CITY OF CHICAGO

Compiled and Edited by
JOHN W. BECKWITH
Corporation Counsel



PREFACE.

Selected opinions of the Corporation Counsel and Assistants rendered by the Department of Law during the incumbency of William H. Sexton, Esq., Corporation Counsel, were published in two volumes upon his retirement from that office. Such publications have been of great value to all departments of the city as the opinions printed therein exhaustively treat practically every municipal problem and construe practically all the ordinances in force prior to the time of their publication.

It is, therefore, advisable to frequently publish the opinions of the Law Department that duplication of work may be avoided and that the department heads of the city may have, readily accessible, a guide to follow in the performance of their various functions.

The increased scope of Chicago's municipal undertakings, together with the passage of remedial and constructive legislation in an enlarged exercise of governmental powers, has resulted in the rendition of thousands of opinions in the last four years so that this publication together with those of my predecessor may, I trust, lighten the work of the Law Department of Chicago in the future.

I take this opportunity to express my appreciation of the able and energetic assistance at all times rendered by the staff in my office and for the co-operation given by them in the handling of its work.

JOHN W. BECKWITH,
Corporation Counsel.

Chicago, Illinois, April 10, 1915.

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Chicago

OPINIONS
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OCTOBER 6, 1914 TO APRIL 26, 1915.

OCTOBER 7, 1914.

In re PAYMENTS TO HOUSE OF CORRECTION PENSION FUND.
HON. JOHN E. TRAEGER, City Comptroller.

Dear Sir:

We have your informal request for an opinion as to whether the provisions of the act creating the House of Correction Employees' Pension Fund, approved June 10, 1911, in force July 1, 1911, require the payment into said pension fund of two per cent. of all reimbursements to the capital account provided by the City Council in the annual appropriation ordinance of 1914.

Section 1 of the pension act referred to provides that the House of Correction Employees' Pension Fund shall consist of two per cent. of the salaries or wages of the employees and two per cent of the "earnings of the House of Correction." (See Hurd's Rev. Stat. of 1913, p. 1358-9.)

We have been advised by Mr. Foote, of your office, that until the capital account was created by the City Council in the appropriation ordinance of 1914, it had been the custom of the City Council to appropriate for all the needs of the House of Correction, and that all the revenue derived from the sale of products, the boarding of prisoners other than those committed for the violation of city ordinances and payment for all work done by the prisoners, etc., was paid into

the general corporate purposes fund after deducting two per cent. thereof for the benefit of the pension fund.

In the course of the last two or three years, however, it developed that the House of Correction did a great deal of work and furnished considerable supplies for the different departments of the City of Chicago. The uncertainty of the quantity of materials required to supply the departmental needs occasioned a great deal of difficulty in estimating the financial needs of the institution. The capital account was created by the City Council to avoid the necessity of appropriating in advance for such materials as it might become necessary for the House of Correction to purchase in supplying the various departments. This capital account is reimbursed by the various departments as supplies are furnished and work is done for them.

We can see no distinction between the earnings of the House of Correction, which are paid into the general corporate purposes fund, and those earnings of the institution which are diverted to reimburse the capital account. If a deduction of two per cent. of the amount paid into the general corporate purposes fund by the House of Correction is made for the benefit of the pension fund, then there is no reason why such deduction should not be made from the amount turned into the capital account from time to time.

The earnings of the House of Correction are not the profits thereof. The word "earnings" in its general acceptance does not mean net earnings unless qualified in some way. (*Smith v. Bates Machine Co.*, 182 Ill. 166.) The act creating the House of Correction Employees' Pension Fund does not qualify the word "earnings" as used in Section 1, heretofore referred to.

We are of the opinion, therefore, that the deduction of two per cent. should not be confined to the amount turned into the general corporate purposes fund, nor to the surplus of the capital account, but that two per cent. of all of the earnings

of the House of Correction, no matter where the proceeds finally find their way, should be paid into said pension fund.

Respectfully submitted,

JOSEPH F. GROSSMAN,
Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,
Corporation Counsel.

OCTOBER 8, 1914.

In re RIGHT OF CITY TO BUILD HOUSE FOR BRIDGE OPERATION
AT LAKE STREET ON WEST SIDE OF CHICAGO RIVER.

MR. JOSEPH F. PEACOCK, City Real Estate Agent.

Dear Sir:

In a letter dated September 4, 1914 you state that incidental to the construction of new bridge across the river at Lake street, the bridge division will build a house for bridge operation in the space lying between the lines in red designated A-B and A-C on a blue line print attached to your letter and that "the bridge division wishes to know whether the construction of a house in this space will be an infringement of the riparian rights of the owners of lot eight, meaning by riparian rights in this case the right of access to the river and the right to use the river for having boats tie up at the dock."

The lot eight referred to as appears from said blue line print is a water lot in block twenty-two of the original town of Chicago and constitutes the west bank of the Chicago River immediately north of the north line of Lake street. The west bank or river line at this point runs northwesterly and southeasterly. The red line A-C is an extension of the north line of West Lake street easterly into the Chicago River and the red line A-B is drawn at right angles to the shore line from the point where the north line of Lake street and the westerly line of the Chicago River intersect.

The riparian rights of a shore owner along a river are first the right of accretions and second the right of access. In addition to these a shore owner's title extends to the center thread of the stream, whether it is navigable or not unless the

boundary is in some way otherwise designated. (*City of Peoria v. Central National Bank*, 224 Ill. 43.)

I know of no adjudicated case where riparian right of access has been apportioned, but there are numerous cases where accretions (which is the other well known riparian right), have been apportioned, I accordingly look to the rule for the apportionment of accretions in order to determine the solution of the question here presented. The Illinois Supreme Court in the case of *Kehr v. Snyder*, 114 Ill. 313, at pages 316 and 317 said:

“The strip of land in controversy is a part of these accretions, and whether it belongs to the plaintiff or to the defendant depends entirely upon what rule is to be adopted in making the division of the accretions. * * *

The rule as stated in appellant's third proposition, which the court refused to hold as law, we regard as substantially correct,—that is to say, ‘measure the entire river front of survey 759 as it existed in 1860, when the third subdivision of Cahokia commons was first laid out,’ and note the aggregate number of feet frontage, as well as that of each parcel or lot; then measure a line drawn as near as may be with the middle thread of so much of the stream as lies opposite the shore line so measured. Having done this, divide the thread line thus measured into as many equal parts as there are lineal feet in the shore line, giving to each proprietor as many of these parts as his property measures feet on the shore line; then complete the division by drawing lines between the points, designating the lot or parcel belonging to each proprietor both upon the shore and river lines. This rule seems to be reasonable, and is well supported by authority: *Gray v. Deluce*, 5 Cush. 9; *Thornton v. Grant*, 10 R. I. 477; *Aborn v. Smith*, 12 *id.* 370; *Müller v. Hepburn*, 8 Bush. 326; *Knight v. Wilder*, 2 Cush. 199. * * *

An examination of the cases will show that in the division of accretions the side lines between adjoining riparian owners are, as a general proposition, wholly disregarded. Thus, in *Manchester v. Point Street Iron Works*, 13 R. I. 355, it is said: ‘One common principle which pervades all modes of division is, that no regard is to be paid to the direction of the side lines between contiguous proprietors.’ (See, also, in this connection, note to *Hagan v. Campbell*, 33 Am. Dec. 280.) In *Gould on Waters*, Sec. 162, it is said: ‘In all cases where practicable, every proprietor is entitled to a frontage of the same width on the

new shore as on the old shore, and at low water mark as well as at high water mark, without regard to the side lines of the upland, unless referred to as guides in particular grants, or established as boundaries by agreement or conduct of the co-terminous proprietors, or the acts of public authorities."

The rule above laid down is commented upon and approved in *City of Peoria v. Central National Bank*, 224 Ill. 43, at pages 52 and 53. At page 56, the court further says:

"The whole doctrine of accretions rests upon the right of access to the water, and it must be convenient access. The right to preserve his contact with the water is one of the most valuable of a riparian owner. In all cases where practicable every proprietor is entitled to a frontage of the same width on the new line as on the old shore."

And at pages 57 and 58, as follows:

"when a division is to be made in which several riparian owners are interested such division must be on equitable principles, so that each owner may secure a water frontage proportionate to the water line formerly owned by him. (*Smith v. Johnson*, 71 Fed. Rep. 647.) The general doctrine laid down by the courts of this State as to the division of accretions is, not that they should be divided at right angles with the center thread of the stream or with the shore line, but in accordance with equity and right as shown by the special facts of each case. When the general course of the river and of the bank are parallel, both as to the old and the new shore line, then the dividing lines may be drawn at right angles to the center thread of the stream. The division in all cases must be so made that each proprietor will have a frontage on the new shore proportionate to that which he had on the old shore, without regard to the side lines of the upland. Gould on Waters, (3d ed.) Secs. 162, 163; *Kehr v. Snyder*, *supra*; *Griffin v. Johnson*, *supra*."

In *Griffin v. Kirk*, 47 Ill. App. 258, the court, at page 260, said:

"The survey of the land described in plaintiff's complaint is made by projecting the lines from the shore to the center of the stream, so as to give the adjoining proprietor a portion of the accretions to the center thread of the stream in proportion to his shore line, and the possession of a riparian proprietor is to the center thread of

the stream to as full an extent as if expressly included in the terms of the description."

In *Nauman v. Burch*, 91 Ill. App. 48, the court at page 51, said:

"The lines should be so projected from the shore as to give the adjoining proprietor a portion of the accretion to the center thread of the stream, in proportion to his shore line. This the evidence shows was done in the case at bar, and by the same methods approved in the cases above cited."

Adopting the rule as above laid down for the settlement of the riparian right to access as there applied to the division of accretions, it appears that a line drawn at right angles with the shore line is not the correct rule for the division of rights, and the method as indicated by the red lines on the blue line print attached to your letter would very likely result in the infringement of the rights of the owners of lot eight.

I suggest that a survey or plat be made of the river at this point showing the full width and both sides of the river, then measure the river front and note the aggregate number of feet of frontage not only of lot eight and Lake street but of such other lots both north and south thereof on each side of the river, to the end that the rights of access of all parties concerned in that immediate vicinity may be equitably determined; then measure a line drawn as near as may be with the middle thread of so much of the river as lies opposite the shore line so measured. Having done this, divide the thread line thus measured into as many equal parts as there are lineal feet in the shore line, giving to each proprietor and to the City as many of these parts as his or its property measures feet on the shore line; then complete the division by drawing lines between the parties, designating the lot or parcel belonging to each proprietor both upon the shore and thread lines. The dividing lines connecting the shore line and the thread line will then indicate the boundary lines of each respective owner's right of access.

I desire to direct your attention to two other matters: first, that the Chicago River is a navigable stream under the jurisdiction of the laws of commerce enacted by Congress and

for that reason no house to be erected by the bridge division can be so placed as to be an obstruction to commerce; second, the common council of the City of Chicago, September 12, 1853 passed an ordinance vacating parts of West Water street in block twenty-two of which said lot eight is a part, and in said ordinance provided as follows:

“Section 4. Ten feet next and adjoining to river street said wharves shall be and remain an open wharf, upon the same conditions and restrictions as contained in the settlement of the wharfing privileges on the south side of the Chicago River.”

The conditions and restrictions referred to were that said strip should always be kept open for foot passengers. I am not advised as to what disposition has been made of this ten foot strip in block twenty-two, but if the public rights in said strip have not been heretofore extinguished in front of this block no bridge house should be so placed as to constitute an obstruction of the public rights under said ordinance.

I return herewith the blue line print which accompanied your letter.

Respectfully submitted,

JAMES G. SKINNER,
Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,
Corporation Counsel.

(Enc. blue line print.)

OCTOBER 8, 1914.

In re THE CLAIM OF THE SANITARY DISTRICT AGAINST THE
CITY FOR COST OF REMOVING POLE ON 22ND STREET
EAST OF THE TRACKS OF THE P. C. C. & ST. L. R. R. Co.,
IN ORDER TO GIVE CLEARANCE FOR TRACK ELEVATION.

HON. JOHN A. RICHERT, Chairman, Committee on Finance.

Dear Sir:

In the above entitled matter I have read the papers which you transmit with your request for an opinion and which are herewith returned to you, including the opinion of the assistant attorney of the Sanitary Board, which is said in the letter of the comptroller of the board to have been approved.

by Mr. Adcock, the attorney for the board. This opinion deals solely with the question of the validity of the provision in the elevation ordinance, by which the city assumes liability for damages to adjacent property owners, and agrees to indemnify the company against such damages. The opinion reaches the conclusion that the Supreme Court of this State has in effect decided that this provision is valid, and relies upon two cases in support of this conclusion.

I do not concur in this conclusion. I do not think there is anything in either of the two Supreme Court cases relied on which necessarily implies the conclusion that this provision of the ordinance is valid. In the Chicago Flour Company case, (243 Ill. 268) the court, at the conclusion of its opinion, expressly guards itself against deciding that this provision in the ordinance is valid. The court says:

“The appellee insists that the city had not the power to assume a liability for damages for which it would not be legally liable, and contends that this portion of the ordinance, if given the construction contended for by appellants, would therefore be invalid. In view of our construction of the ordinance it is unnecessary to determine this question.”

In the other case relied on, *City of Chicago v. P. C. C. & St. L. R. R. Co.*, 244 Ill. 220, the court decided that, where the city had claims of its own against the railroad company for damages caused by the erection of viaducts over streets, it could validly release such claims in consideration of the railroad company consenting to accept a track elevation ordinance, requiring it to remove the viaducts, elevate its tracks, and do various other things which it could not be compelled to do. This is obviously something very different from deciding that a city can make itself liable for damages accruing to third parties, for which it would not otherwise be liable, in consideration of the company's agreeing to do something which the city could compel it to do.

However, there is nothing to be gained by discussing this question further. It has been and is the settled policy of the city, in its dealings with the railroads which have accepted elevation ordinances and elevated their tracks, to proceed upon the assumption that this provision is valid. There are strong

reasons, based on principles of public policy as well as on principles of fair dealing, why the city should act in this way. I shall assume, for the purpose of this opinion, that the provision in the ordinance is valid and that under this provision the city would be liable to indemnify the company against all valid claims for damages to adjacent property necessarily resulting from the doing of the elevation work, and not the result of the negligence either of the railway company or of the party claiming the damage.

It may be as well to note that, under the decisions in the Chicago Flour Company case above referred to and in the recent Otis Elevator case, 263 Ill. 419, the provision in the ordinance creates no direct liability by the city to the party damaged, if there would not otherwise be such liability. It is strictly a provision of insurance or indemnity, obliging the city to indemnify the company against liability of a certain kind. But I lay no stress on that feature of the case here. I concede, for the purpose of this opinion that, if the city would ultimately have to pay, in case there is a liability against the railroad company, it may as well pay in the first instance, treating the liability as being against itself.

The question remains—Is the cost of removing this pole such a kind of damage as to be within the provision of the ordinance binding the city to indemnify the company against damages to adjacent property?

The pole in question was placed where it originally stood, at the south curb line of 22d street, without the district having obtained from the city by ordinance any general leave to place its poles in the streets and without its having obtained by permit from the street department any special leave to place its particular pole at the place at which it was placed. The district has claimed and still claims that it derives its right to place its poles for light distribution in the streets of the city by direct grant from the legislature; and that it, therefore, needs no leave by ordinance from the city to do this. This question is fully discussed in a report made by Master Zeisler to the Circuit Court in the case of *Lyman v. Sanitary District of Chicago*, which report will be found in Vol. 36 of the National Corporation Reporter on page 616

and the following pages. I am informed that this report was approved by Judge Walker; that a decree in accordance with the report was entered in the case; and that from this decree there has been no appeal.

After discussing at length the provisions of the original act of 1889, under which the district was organized, and of the amending act of 1903, the master states his conclusion as follows:

“For all the foregoing reasons I conclude that it was the intention of the legislature to vest, and that it did vest in the Sanitary District the power to enter upon public streets for the purpose of constructing transmission lines, subject to the right of the municipal authorities to make and enforce all reasonable regulations bearing upon the manner of the exercise of this power, and that the power thus granted directly by the legislature is independent of the consent or permission of the municipal authorities.”

Down to the late spring or early summer of 1908 the district, in exercise of the power so claimed to have been given to it by the legislature, had been placing its poles in the streets where it saw fit, without obtaining any permits from the street department. In the late spring or early summer of 1908 the police department, at the request of Mr. Fisher of the street department, put a stop to this practice. This led, after some wrangling and threats of legal proceedings by the district, to the passage by the City Council on July 17, 1908, of an order directing the commissioner of public works to issue permits to the Sanitary District “allowing it to erect poles, lay conduit and string wires” in the streets. Since the passage of this order, permits for laying these poles at specified places in the streets have been applied for by the district and granted by the street department.

Mr. Fisher has, at my request, made search to find if any permit was ever issued for the placing of the pole in question. He has been unable to find any trace of such permit having been issued. From this fact, taken in connection with his recollection as to how far the district had come with its poles when he stopped the placing of poles in the street without permits, he concludes that this pole must have been placed

at its original location very shortly before he took this action. I presume, therefore, that I am quite safe in assuming that this pole was placed at its original location not earlier than January 1, 1908. The track elevation ordinance in question in this case had been previously passed on September 3, 1907.

It appears, therefore, that in view of the special facts of this particular case, the liability of the city, under the provision in the ordinance, would depend upon the answers to be given to the following questions.

1. Where a public service corporation, or a municipal corporation acting for the time being as a public service corporation, in pursuance of a general power of using the streets for its poles and wires, whether granted directly by the legislature or indirectly by ordinance of the City Council, places a pole in a particular place close to the tracks of a steam railroad, without having obtained any permit from the street department to place the pole at that place; and where, before the pole is so placed, there has been passed by the City Council a track elevation ordinance directing the elevation of the tracks of such steam railroad; and where the work prescribed by such ordinance is of such a character as to necessarily require the removal of such pole or the substitution of a higher pole; and where such public service corporation is required by the city, or its agent, to remove such pole or to substitute a higher pole, in order to permit of such track elevation work being done; has such public service corporation a right to recover, either against the city or against the railroad company, the necessary cost of removing such pole or of substituting a higher pole?

2. If it has the right to recover such cost as against the railroad company, is such cost of damage to adjacent property within the meaning of the provision in the ordinance giving the railroad company a remedy over as against the city, when obliged to pay such damage?

The following considerations suggest negative answers to both of these questions.

When a city allows a public service corporation to use its streets for the purpose of placing there the instruments necessary to its service, such permission is subject to the right of

the city to make all reasonable regulations and requirements in the exercise of its police power or its special rights and duties in respect of its streets, including the right to improve such streets for all legitimate purposes for which streets are commonly used.

C. B. & Q. R. R. Co. v. City of Quincy, 136 Ill. 563;

C. B. & Q. R. R. Co. v. City of Quincy, 139 Ill. 355;

Kirby v. Citizens Railroad Co., 48 Md. 168; 30 Am. Rep. 455.

Master Zeisler rightly concludes, in the extract above quoted, that this principle applies as well in the case where the general power to use the streets is given directly by the legislature, as in the case where it is given by the municipality.

A striking application of this principle is to be found in the decisions of our Supreme Court in regard to this very question of track elevation. It is held that, even when a city has, by ordinance, expressly allowed a railroad company to cross its streets at grade, without reserving any power to compel elevation, it may nevertheless compel the company to elevate such tracks at its own cost, when the public safety calls for such elevation.

Summerfield v. Chicago, 197 Ill. 270;

People v. A. T. & S. F. Ry. Co., 217 Ill. 594;

Weage v. C. & W. I. R. R. Co., 227 Ill. 421;

Chicago v. P., etc., Ry. Co., 247 Ill. 319;

Murphy v. C. & C. Ry. Co., 247 Ill. 614;

Chicago, etc., Ry. Co. v. Minneapolis, 232 U. S. 430.

Applying this principle in the present case it would seem that, even if the city had expressly authorized the placing of the pole where it was originally placed, it could still require the removal of the pole or the substitution of a higher pole when the exigencies of the public safety required such action in order to permit of the elevation of the railroad tracks, without being liable to the public service corporation for the cost of such removal or substitution.

Again, it would seem from what has been said above that the district placed the pole there after the ordinance directing the track elevation had been passed. Was not the necessity

of moving the pole caused by the negligence of the district in placing the pole in such a position as that it had to be moved in order to make possible the work of track elevation already directed by the ordinance?

It is said in the letter of the comptroller of the Sanitary District that the work of removing the pole was directed to be done by G. E. McCurdy, the engineer in charge on behalf of the railroad company of the track elevation work, and that Mr. McCurdy expressly directed the district to charge the expense to the railroad company. It is possible that, if Mr. McCurdy did so direct, this might have the effect of making the company liable. But there is no need for me to express any opinion on that question here. The liability so caused, if there be such a liability, is certainly not within the class of claims against which the city agrees to indemnify the company by the provision in the ordinance.

The amount of the claim is trifling, but the principle is an important one to the city.

Upon the whole, I am of the opinion that the liability of the city to pay this claim is so far doubtful as to render it advisable that the city should decline to pay the claim until its liability has been affirmed by at least a court of first instance. The facts are not in dispute; and it will be easy for the district to obtain the decision of a court at a trifling cost.

Respectfully submitted,

WM. DILLON,

Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,
Corporation Counsel.

OCTOBER 14, 1914.

In re REASONS JUSTIFYING REFUSAL OF PERMIT.

HON. RAY PALMER, Commissioner of Gas & Electricity.

Dear Sir:

Your letter of October 9, 1914, addressed to the Corporation Counsel in reference to the issuance of permits to Marx Bros. Sign Company, has been referred to me for reply.

It appears that some person, or persons, connected with

this concern, attempted to use an old permit fraudulently for the erection of a sign at 1246 Milwaukee avenue, and that upon your orders, the police department stopped such installation. Such being the facts, the legal phase of the matter is that an attempt was made to perpetrate a fraud and that the same was unsuccessful.

The law does not provide for the punishment of such an attempt and does not give you authority to refuse the issuance of permits to such a concern for that reason. Section 853 of The Chicago Code, however, says in part:

“The authority granted for the erection of any such sign, may be revoked at any time by order of the Mayor or City Council, and any inspection or permit fees paid to the city for such sign, shall not be refunded in case of any such revocation.”

Section 855 provides for a penalty for the violation of any provision of the ordinances regulating the issuance of such signs.

You state, however, in the same letter, that the Marx Bros. Sign Company is delinquent in its payment for electrical permits during the year of 1913 and that the amount of such delinquency for that year is \$331.13, as you have been informed by the comptroller.

Section 1518 of The Code provides:

(“No license or permit to any person indebted to the city.) Hereafter, no license or permit shall be issued to any person, firm, or corporation, unless and until, such person, firm, or corporation discharges and pays to the City of Chicago all indebtedness then due from such person, firm, or corporation.”

It is, therefore, manifest that it is your duty to withhold and refuse any permit to this concern, until the amount of its delinquent fees are paid.

Yours very truly,

VERNON L. BEAN,
Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,
Corporation Counsel.

OCTOBER 14, 1914.

In re NOISE AS A PUBLIC NUISANCE.

DR. WILLIS O. NANCE, Chairman, Committee on Health.

Dear Sir:

Your letter of October 1, 1914, relative to a complaint concerning the noise made by a sheet iron factory in the neighborhood of East 69th place and Cottage Grove avenue has been referred to me for reply.

Upon inquiry at the building department we learn that the work concerning which this complaint is made consists of the manufacture of hollow concrete posts on vacant property, and no building permit or frontage consent was required therefore in the matter. It appears, under these circumstances, that the concern of the city in such a case is whether or not it constitutes a public nuisance. The ordinances of the city do not specifically designate such an industry as a common nuisance. Section 1429 of The Chicago Code provides that in addition to such things as are defined as nuisances by municipal ordinances those offenses which are known to the common law of the land and the statutes of Illinois as nuisances may also be proceeded against by the municipality.

As the manufacture of these products is not a statutory nuisance, the question finally resolves itself into whether the same is a public nuisance under the common law.

The Supreme Court of this State has set forth its conception of a public nuisance under the common law in *Earp v. Lee*, 71 Ill. 193, as follows:

“Hawkins, in his Pleas of the Crown, defines a common nuisance as an offense against the public, by doing anything injurious to all the King’s subjects, or by omitting to do that which the common good requires. It follows that private annoyances are not the subject of public prosecution, but of a private action.”

This view is repeated in *City of Chicago v. Shaynin*, 258 Ill. 69 and other cases.

In so far as the matter is explained in the correspondence, it does not appear that the noise created by the manufacture of the posts or chutes approaches the broad scope of a public nuisance at common law. The remedy, therefore, as indicated

by the Supreme Court of this State, lies in a private action against the parties responsible for the annoyance.

Yours truly,

VERNON L. BEAN,
Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,
Corporation Counsel.

OCTOBER 15, 1914.

In re LOCATION OF STONE CRUSHING MILLS.

HON. WILLIS O. NANCE, Alderman Sixth Ward.

Dear Sir:

The letter of Mr. L. Kranze, inquiring whether a stone crushing mill can be operated in the district between Grand avenue and North avenue in the neighborhood of his home at 1419 North Crawford avenue, had been referred to me for reply.

The city ordinances do not classify such a mill as a nuisance, and it is not included among those industries which are required to secure frontage consents before the building permit is granted. For a private nuisance a private action will afford a remedy.

The statutes of this State, however (Chapter 38, Section 221, Paragraph 8, Hurd's Revised Statutes 1909), provide that it is a public nuisance "to erect, continue or use any building or other place for the exercise of any trade, employment or manufacture which, by occasioning noxious exhalations, offensive smells or otherwise, is offensive or dangerous to the health of individuals, or of the public."

Section 222 of the same chapter provides for a fine of one hundred dollars for the first offense, and a like amount together with imprisonment in the county jail for a subsequent offense. The Municipal Court Act (Chapter 37, Section 290, Paragraph 27, Hurd's Revised Statutes 1909), makes provision:

"That all criminal cases in the Municipal Court in which the punishment is by fine or imprisonment otherwise than in the penitentiary, may be prosecuted by in-

formation of the Attorney General or State's Attorney, or some other person, * * *."

If this mill can be shown to constitute a public nuisance under the statutes, the same may be prosecuted on an information as provided in the statutes herein quoted, and Mr. Kranze may make his complaint to the State's Attorney for the purpose of starting such proceedings.

Very truly yours,

VERNON L. BEAN,

Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,

Corporation Counsel.

OCTOBER 16, 1914.

In re MORGAN PARK FINANCES.

HON. JOHN E. TRAEGER, City Comptroller.

Dear Sir:

You have asked this department to advise you as to the proper course for you to pursue in order to bring the accounts of the City in relation to Morgan Park affairs into proper shape, so that deficiencies which have been created through the misapplication of the funds of the former village may be wiped out.

The difficulties that you have encountered spring mainly from two sources. One of these is the fact that in the year 1912 the village authorities issued anticipation tax warrants amounting to \$5,815.23, bearing interest at the rate of five per cent. against the taxes of 1912 which have not been paid. The other is the fact that in disbursing collections from special assessments the funds were used indiscriminately in the payment of warrants without reference to the particular ones to which they should have been applied.

We learn from you that there has been no audit of the accounts of the village authorities from which it can be ascertained with certainty whether, in the confusion resulting from the interchanging of funds, there has been a loss to the municipality, but on the other hand there does not appear to

be any reason for believing that any funds were converted to private use or any intentional dishonesty existed.

Under the circumstances we advised you some time ago to give notice to the former officials to the effect that they would be held liable for any shortage that could not be recouped out of moneys that are to be collected in the future. This was necessary in order to insure the City against possible loss, although we were of the opinion at the time that a way could be found by the City Council for relieving the situation. We are still of this opinion and we now undertake to point out the way in which this can be done.

With reference to the tax anticipation warrants above referred to, it appears quite clear that they were unlawfully issued and are void. In case they were valid the only funds that could be applied for their redemption would be such portions of the village's taxes of 1912 as have not yet been collected. Hence, it is much simpler to treat them as void, as they in fact are.

These tax anticipation warrants were issued to the Sanitary District in lieu of money due to that municipality for electric lighting service. This was contrary to the statute. Under the law as it stood prior to the amendment of 1901 it was proper to issue such warrants in payment of debts, but the amendments of the act did away with this power, and provided that such warrants could be issued only for cash. In other words, instead of using them directly for the payment of bills, the amended law contemplated that a fund should be provided by the issuance of warrants out of which the ordinary and necessary expenses of the municipality could be paid. The courts of the state have so interpreted the amendments.

In the case of *People ex rel. Sims v. Cooley*, 146 Ill. App. 113, the court, in passing on a similar warrant, said:

"Section 2 of chapter 146 A of the Revised Statutes in force July 1, 1901, which authorizes the issuing of orders in anticipation of a tax in substance provides: that whenever there is not sufficient money in the treasury of the county * * * to meet and defray the ordinary and necessary expenses thereof, it shall be lawful for the proper authorities of the county to provide a fund to meet

said expenses by issuing and disposing of warrants drawn against and in anticipation of any taxes already levied by said authorities, for the payment of the ordinary and necessary expenses of such county, to the extent of 75 per cent. of the total amount of any such tax levied, etc. Section 3 of the same chapter provides that such order shall, unless paid within thirty days from their issuance, bear interest at five per cent. until paid.

The order involved, payable out of the taxes of 1907, was unauthorized. The action of the Board in adopting the resolution, contemplated the drawing of orders by the clerk, in anticipation of the tax of 1907, in payment of claims as they should be allowed. Such action directing payment of miscellaneous claims as they should be allowed would seem to have been taken under the law as it stood prior to July 1, 1901, which authorized such warrants in payment of ordinary and necessary expenses of the county, but was not what is contemplated by such Sections 3 and 4 as revised in the law of 1901. Those sections seem clearly to contemplate the providing of a fund by issuing orders in anticipation of a tax against which fund orders may be drawn to meet and defray the ordinary and necessary expenses of the county. In other words, orders cannot be issued in anticipation of a tax to meet or pay miscellaneous items of indebtedness owing by the county, but when the board shall have determined that it has insufficient money on hand to defray necessary expenses of the county, it then becomes the duty of the county board to provide a fund for that purpose by issuing orders, which draw interest after thirty days from their issuance, in anticipation of taxes levied."

People ex rel. Sims v. Cooley, 146 Ill. App. 113.

In *Lansden v. Alexander County Bank*, 257 Ill. 309, at page 314, the court said:

"While there is no conflict between Section 117 (of the Schools act) and the Warrants act there is a marked distinction in the purposes of the two statutes. Under Section 117 the school directors could issue warrants to persons to whom they had incurred liabilities, and the person to whom the warrants were issued could either hold them until the taxes against which they were issued were collected or discount them for cash. The inconvenience of that method of doing business was recognized by the legislature and attempted to be remedied in the War-

rants act. That act authorized municipal corporations, including school districts, 'to provide a fund to meet said expenses by issuing and disposing of warrants drawn against and in anticipation of any taxes already levied,' and all warrants lawfully issued under the act would draw interest at five per cent. per annum from date, unless paid within thirty days after their issuance."

Under the interpretation of the statute, above set forth the warrants in question must be regarded as void.

We therefore recommend that you at once notify the Sanitary District that these warrants will not be recognized as binding on the City of Chicago. The question of whether or not the original debt remains an obligation of the City of Chicago may be dealt with when it arises.

Taking up the matter of misapplication of funds in the payment of special assessment warrants, we find that a more complicated situation presents itself.

We called for information from the attorney who represented the village and endeavored to ascertain what plan had been followed by the officers of the village in paying off warrants.

The village attorney stated that the village authorities, in levying assessments for local improvements, had included in each of these assessments a levy for six per cent. of the estimated value of same, to pay for costs and expenses, as provided for in Section 94 of the Local Improvement Act of 1897 as amended in 1901. These costs and expenses had then been paid out of the general corporate fund, a procedure authorized by that section of the statute. He stated that all of these costs and expenses are paid, that there are about \$300,000 worth of improvements in which the final instalments are not yet collected, and that by reason thereof the sum of approximately \$18,000 will be secured from this levy of six per cent. which can be applied to meet any deficiency in the general fund caused by being drawn on in this way. The only thing that is necessary to accomplish this is, that the Board of Local Improvements should, upon final confirmation, look to it that the six per cent. levied for these costs and expenses should be included as a part of the cost of the im-

provement. If these figures are approximately correct it will simplify the adjustment of the accounts of the village so far as the general corporate fund of the village is concerned.

With respect to the plan followed by the village authorities in paying off special assessment warrants, we are unable to discover any system. It would seem as though these warrants were taken up haphazard, as found convenient, without reference to whether the funds on hand were to be applied under the law to any particular warrant or warrants.

In the absence of an audit, there is no way of straightening this out except by applying moneys hereafter collected on warrants that remain unpaid. Whether such a procedure will result in fully closing up the matter is doubtful, and depends altogether on the amount which will be collected.

From a trial balance drawn off the ledger of the village there is shown an aggregate of \$16,997.56 to the credit of certain warrants, and an aggregate of warrants overdrawn amounting to \$16,106.66. The difference, or the amount of cash which should be on hand, is \$890.90. To cover this, \$56.26 was turned over by the village treasurer, and \$182.85 remains in the hands of the city unexpended from funds received by the city during the period of the first annexation. The net shortage, therefore, is \$651.79. The presumption is that this amount was used for purposes of the general corporate fund. It was therefore illegally withdrawn from the fund out of which the warrants are to be met, and, if so, there is no reason why it cannot be replaced by order of the City Council.

We apprehend it would be impracticable to attempt at this time, especially without a complete audit, to draw an order of the City Council which would restore the funds to the credit of the individual warrants to their proper status. We recommend, therefore, that as to this phase of this situation, a general order be made authorizing you to apply collections as they come in on special assessments to the payment of such warrants as have not been paid. This would be irregular, it is true, and we would prefer to draw an order making transfers of funds after all the moneys had been collected. But such a course would mean long delay in the

payment of those who are now actually entitled to their money, and result in no advantage to the city. In its last analysis, the course we recommend amounts to the same thing. When all the warrants have been paid it may be said that although the funds were originally misapplied the irregularity has been cured by subsequent payments having the effect of transferring the funds from one account to another the same as if it had been done by specific order in each instance.

We have therefore drafted an order authorizing the transfer of \$651.79 from the general fund to the account of the fund to be used for the payment of special assessment warrants, and authorizing the city comptroller and city treasurer to pay all unpaid balances on special assessment warrants of the village of Morgan Park out of funds on hand or to be collected in the future derived from levies for special assessments made by the former village.

If the figures submitted by the attorney for the village are approximately correct there will be a balance resulting from the collection of the six per cent. levied for costs and expenses which can ultimately be transferred to the general corporate fund where it belongs. If, on the other hand, these figures are not correct and there should be a shortage, it will have to be dealt with at some time in the future.

Yours truly,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,
Corporation Counsel.

OCTOBER 19, 1914.

In re RIGHT TO LOAN TRACTION FUND.

HON. JOHN A. RICHERT, Chairman, Committee on Finance.

DEAR SIR:

In pursuance of the request of your committee for an opinion on the legality of loaning a portion of the traction fund for the purpose of obtaining money for the construction work now going on in the city's harbor, for which the city is to pledge harbor bonds, we submit the following:

The traction ordinances under which the fund in question is created provide that the money shall be expended only for specific purposes mentioned therein. These are of such a nature that the bulk of the fund cannot be expended for some years to come. Consequently, while this fund is inactive the city stands in the relationship of a trustee to it. As such trustee it is bound to so handle it as to make it productive. This is the rule in all cases where a trust fund is to be held for a considerable length of time. There is no exception even in the case of a municipal corporation, nor in the case of the Secretary of the Treasury of the United States when he is made the trustee.

Muskegon Traction & Lighting Co. v. City of Muskegon, 167 Mich, 331, 338.

Sinking Fund Cases, 99 U. S. 700, 725.

Hence, the only question presented is whether the city is bound by the limitations imposed on municipal corporations in such a way that it cannot employ the money as other trustees would be obliged to employ it.

The traction fund having been created by ordinance differs materially from funds created by statute, such as sinking funds, pension funds, the water fund and others.

The statutes contemplate that all public funds should draw interest, and in case of the city's funds provide a method for depositing them so as to secure the best rate of interest obtainable from regularly constituted national and state banks. Aside from that, there is provision made in the statutes for using money in sinking funds in excess of the amount required for meeting maturing bonds during the current or succeeding year for the purchase of outstanding bonds of the particular issue for which such sinking fund is being accumulated. There is also provision for using money in any fund set aside for some particular purpose which is not required immediately for the purchase of tax anticipation warrants of the municipality.

While there is no provision of the statute which forbids the investment of funds of the city, the fact that the uses above mentioned, are so specifically provided for, under a

familiar canon of construction, is held to mean that all other methods of investment are precluded.

Moreover, there had been decisions, prior to the enactment of the statutes referred to above, which were looked upon as prohibiting any use of such funds except as the statutes may expressly permit.

People ex rel. City v. Hummel, 215 Ill. 43.

Same v. Same, 215 Ill. 71.

But it will be noted that there is nothing in the statutes which governs the action of the city in respect to such a fund as the so-called traction fund. The city, in passing the contract ordinances under which the traction companies operate, reserved entire control of the traction fund of the city. It was therefore unnecessary to insert any provision relating to the investment of same.

This fund stands out distinctly as a different kind of fund than any of those created by statute, and is not affected by either the provisions of the statute or the decisions which interpret them. Such being the case, the rule governing the handling of trust funds must apply.

Authorities are not wanting to sustain our position in this respect.

In *McQuillin on Municipal Corporations*, Section 2163, the author uses the following language and supports same with numerous decisions:

“Seldom have municipal corporations surplus moneys for loan or investment. But where such a condition of affairs presents itself, the municipality has power to loan or invest in proper securities, unless it should be forbidden by statute.”

To the same effect are the following:

Foote v. City of Salem, 96 Mass. (14 Allen) 87;

Commissioners v. Walker, 6 How. (Miss.) 143, 38 Am. Dec. 433;

Sinking Fund Cases, 99 U. S. 725.

We are therefore of the opinion that the City Council will be acting entirely within its powers if it authorizes the use of money from the traction fund for investment in duly

authorized municipal bonds of the city, or, as is now contemplated, for a loan to the city on the pledging of such interest bearing bonds as security.

Yours truly,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,

Corporation Counsel.

OCTOBER 19, 1914.

In re REGULATION AND CLASSIFICATION OF RUNNERS.

HON. CARTER H. HARRISON, Mayor.

DEAR SIR:

We are in receipt of letter from Police Captain Thomas E. Meagher to yourself, dated October 16th, 1914, in respect to licensed runners soliciting at the Northwestern Railway Depot, with notation thereon by you, suggesting that this department draw an amendment to The Chicago Code of 1911, eliminating all runners, except runners for hotels.

The power of the city in respect to runners is found in the forty-third clause of section 1 of Article V of the Cities & Villages Act, which clause is as follows:

“Forty-third: To license, regulate, tax and restrain runners for stages, cars, public houses, or other things or persons.”

We are of the opinion that while the city may under this clause “license, regulate, tax and restrain” runners, it cannot “prohibit” them.

Under the power to “restrain” runners we think the city would have the right to forbid them to solicit within a reasonable distance of depots and boat landings. We have accordingly prepared and send, herewith, draft of an ordinance amending chapter LXI of The Chicago Code of 1911, entitled “Runners” so as to forbid persons acting as runners for any restaurant, boarding house, store or public house of any kind, other than a hotel, to solicit patronage within two hundred and fifty feet of any passenger depot of any railroad or any public boat landing.

There may be some question as to the validity of this ordinance because it exempts runners for hotels. We are, however, inclined to think that the classification between hotel runners and the other classes of runners would be sustained as reasonable.

Yours respectfully,

BRYAN Y. CRAIG,

First Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,

Corporation Counsel.

OCTOBER 19, 1914.

In re CERTAIN QUESTIONS REGARDING THE CITY'S RIGHT TO
CONSTRUCT UTILITY GALLERIES UNDER SIDEWALKS IN
THE CITY'S STREETS.

HON. WILLIAM J. HEALY, Chairman, Commission on Down-
town Municipal Improvements, City of Chicago.

DEAR SIR:

We have your letter of the 7th instant in regard to the above matter, which letter is herewith returned to you. In this letter you ask in substance the following three questions:

1. Can the city use the sub-sidewalk space for the purpose of constructing utility galleries in cases where the fee of the street is in the abutting owner as well as in cases where the fee of the street is in the city?

2. Is any special legislation needed to enable the city to compel utility companies occupying space in the city's streets, under a franchise granted by the city, to remove their instrumentalities to the galleries or subways constructed for the purpose of accommodating the same, whenever the City Council shall deem that the congestion of utility services in a given street justifies the construction of such galleries or subways?

3. May the city legally amend its ordinances, covering the use of the streets by public utility companies, so that the privilege granted in the future to any company to occupy the streets of the city shall contain a proviso that the com-

pany shall remove or transfer its conduits, pipes or other property into any subway or other structure the city may in the future build or provide? -

1. As to the first question, the doctrine of the cases in 247 Illinois, known as the sub-sidewalk space cases, is that when the fee of the street is in the city, the owner of an abutting lot has no right to use the sub-sidewalk space, unless permission for such use be given him by the city; and that the city may charge him rent for the privilege of so using the sub-sidewalk space; but that where the fee of the street is in the abutting owners, such owners have the right to use the space beneath the surface, without paying any rent to the city, so long as the city is not itself using such space for legitimate street purposes. This right, however, is entirely subject, even where the fee is in the abutting owners, to the right of the city to use the sub-surface space for legitimate street purposes, if and when it shall see fit to do so.

Ryerson v. Chicago, 247 Ill. 185.

Tacoma S. D. Co. v. Chicago, 247 Ill. 192.

Sears v. Chicago, 247 Ill. 204.

Farwell v. Chicago, 247 Ill. 235.

Northwestern Trust Co. v. Chicago, 247 Ill. 238.

Williams v. Chicago, 247 Ill. 240.

Illinois Trust, etc., Bank v. Chicago, 247 Ill. 264.

Sheldon v. Chicago, 247 Ill. 267.

From inquiries made in the Bureau of Compensation, we understand that the practice of the city has been to issue revocable permits for the use of sub-sidewalk space and not in any case to make leases. It will, therefore, be unnecessary to consider here what might be the effect of provisions in leases purporting to give a right of user for a stated time.

From the doctrine of the sub-sidewalk space cases, as above stated, it obviously follows that the first of your questions must be answered in the affirmative, provided that the making of utility galleries under the sidewalks is a legitimate use of the street for street purposes. By a utility gallery we understand you to mean a space in which will be placed the pipes and other instrumentalities used by the city

in connection with its water supply or its drainage system, or used by public utility corporations as instrumentalities for the supply of their respective utilities. We have no hesitation in saying that at least most of these instrumentalities constitute legitimate uses of the street for street purposes. It is well settled that even where the fee of a street is in the abutting owners, and where the municipality has only, in behalf of the public, the easement to use the strip of land as a street, the easement is not confined to the right to use the surface; it carries with it the right to use the sub-surface space for all purposes usually incidental to the use of a strip of land as a street in cities. For example, the city has clearly the right, as incident to its easement, to excavate below the surface for sewers, water pipes, etc.

Elliott on Roads and Streets, 3d Ed., Vol. 1, p. 22, par. 20.

Dillon on Municipal Corporations, 5th Ed., Vol. 3, p. 1907, par. 1211.

We, therefore, answer your first question in the affirmative.

2. The right of the city to compel public utility corporations to remove their pipes to such galleries would be subject to the provisions, if any, in the ordinances granting franchises, which expressly or by clear implication gave to the companies the right to place their instrumentalities where they have been placed during the continuance of the franchise; unless the city could show in such cases that the public health or safety called for the removal of such instrumentalities to the proposed utility gallery. In the track elevation cases, the Supreme Court of this state has held that, even when a city has, by ordinance, expressly allowed a railroad company to cross its streets at grade, without reserving any power to compel elevation, it may nevertheless compel the company to elevate such tracks at its own cost, when the public safety calls for such elevation.

Summerfield v. Chicago, 197 Ill. 270.

People v. A. T. & S. F. Ry. Co., 217 Ill. 594.

Weage v. C. & W. I. R. R. Co., 227 Ill. 421.

Chicago v. P. etc. Ry. Co., 247 Ill. 319.

Murphy v. C. & C. Ry. Co., 247 Ill. 614.

Chicago, etc., Ry. Co. v. Minneapolis, 232 U. S. 430.

The same principle would apply to the case of requiring public utility companies to remove their pipes and other instrumentalities and place them in sub-sidewalk galleries even though no such right was specially reserved in the ordinances granting the franchise. No special legislation would be necessary in such case in order to create the power in the city. The general police power and the general powers in respect to streets given to cities by the Cities and Villages Act are ample for the purpose.

We, therefore, answer your second question as follows:

No such special legislation is necessary. The city can order the pipes, etc., removed to the proposed utility gallery, unless the ordinance granting the franchise, either expressly or impliedly, gives the company permission to place them where they are. If this permission is given by the ordinance the removal cannot be ordered, during the life of the ordinance, unless the city can show that it is reasonably necessary in the interests of public health or safety.

3. We answer your third question in the affirmative. We do not deem it necessary to argue or cite authority in support of this answer.

Respectfully submitted,

WILLIAM DILLON,

Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,

Corporation Counsel.

OCTOBER 20, 1914.

In re CHANGE OF BOUNDARIES WITHIN WHICH NEIGHBORHOOD
SERVICE IS FURNISHED BY THE CHICAGO TELEPHONE
COMPANY.

HON. MONTAGUE FERRY, Commissioner of Public Service.

Dear Sir:

In reply to your request relative to the restrictions, by the Chicago Telephone Company of neighborhood service

furnished by it, to the district set out on maps filed by said company at the time of the passage of its ordinance, the service having been up to the present time actually rendered to a larger territory, we refer you to paragraph (e) of section 6 of the ordinance of November 6th, 1907, and paragraph (h) of section 2 of the ordinance of May 26th, 1913.

The paragraph first referred to expressly grants to the Chicago Telephone Company the right to establish neighborhood exchanges within the City of Chicago and provides that exchanges already established cannot be *abolished* except under certain conditions. The express provision prohibiting the abolishment of existing exchanges by implication implies that the company could in the future establish and then abolish neighborhood exchanges at its pleasure. The question then arises as to whether existing exchanges could be enlarged, concerning which there is no doubt, and whether the enlargement of an existing exchange presents any different question than the establishment of a new exchange.

We are of the opinion that the propositions are similar and that the Chicago Telephone Company has the right to add to exchanges existing at the time of the passage of the ordinance and later discontinue service of that character to so much of the district as had been added.

Paragraph (h) of section 2 of the ordinance of 1913 is precisely the same as paragraph (e) of section 6 of the 1907 ordinance so far as it bears upon the question presented by you and applying an established rule of construction it must be presumed that this section used the words and phraseology therein in the same sense in which they were used at the time of the original adoption of the same. This construction is fortified by section 7 of the 1913 ordinance, which provides that only so far as it conflicts with or varies from the provision of the 1907 ordinance shall it be considered as an amendment to the same, but that in all other respects the 1907 ordinance shall be in full force and effect.

We are of the opinion that said company may at any time restrict the neighborhood exchange service to the boundaries within which such exchange was established or maintained at

the time of the passage of the ordinance of November 6th, 1907.

In connection with this opinion we desire to call your attention to the further provisions of the sections hereinabove referred to which provide that the city council may direct neighborhood service to be furnished in specified districts by the passage of an ordinance or resolution after giving said company thirty days notice, provided a reasonable demand for such service exists.

Very truly yours,
 LORING R. HOOVER,
Assistant Corporation Counsel.

Approved:
 JOHN W. BECKWITH,
Corporation Counsel.

OCTOBER 20, 1914.

In re CITY'S PRESCRIPTIVE RIGHT TO USE LOTS 25 AND 26,
 BLOCK ONE, AND LOTS 25 AND 26, BLOCK TWO, IN ED-
 WARDS & DANA'S ADDITION FOR STREET PURPOSES AS A
 PART OF BELLEPLAINE AVENUE.

HON. JOHN E. TRAEGER, City Comptroller.

Dear Sir:

Under date of October 13, 1914, Mr. Joseph F. Peacock, City Real Estate Agent, in a letter approved by you, has asked this department for an opinion as to whether the City of Chicago has a prescriptive right to use lots 25 and 26, block one, and lots 25 and 26, block two, in Edwards & Dana's Addition, for street purposes as a part of Belle Plaine avenue. Accompanying said letter is:

(a) A tax deed by Peter B. Olsen, County Clerk, to the City of Chicago, dated July 8, 1904, conveying lots 25 and 26 of block one;

(b) Carbon copy of a quitclaim deed dated December 14, 1898, by C. F. Kimball and Ethel Kimball to the City of Chicago, conveying (with other property) lots 25 and 26 in block one in Edwards & Dana's addition;

(c) Sheets showing tax search from 1874 to 1900, by which it appears that the taxes on the aforesaid four lots were paid at various times by private individuals and were many times sold for taxes;

(d) Letter of Robert H. Stoll, dated April 25, 1910, in which he claims to be the owner of said lots 25 and 26 in said block one, and states that at no time have condemnation proceedings been started by the city to acquire these lots; that the city maps show these lots are not a part of the street but that the county maps (used for taxing purposes) show these two lots to be a part of the street or desired by the city for street purposes, and that the county records show for some years back that the lots have been exempt from taxation;

(e) Copy of letter of city real estate agent dated May 10, 1910, addressed to the corporation counsel, setting forth that Donnelley's Atlas of Chicago, corrected to January 1, 1909, shows the four lots to be private property; that lots 25 and 26 in block one would form the southern half of Belleplaine avenue between Syracuse and Springfield avenues if opened through, and lots 25 and 26 of block two would form the southern half of Belleplaine avenue between Syracuse and North 40th avenues;

(f) Opinion of Assistant Corporation Counsel George M. Bagby, dated June 16, 1910, setting forth that he is advised that sidewalks have been laid, water pipes placed and sewer connections effected, and that the city in various ways has exercised and is exercising dominion over the land; that he is reliably informed that for more than 20 years last past these four lots have been continuously, openly and notoriously used by the city as a part of Belleplaine avenue; quotes from the letter of one resident to the effect that Belleplaine avenue had been open as a street since 1888—this letter, however, is not explicit as to each of the four lots.

In order to pass upon the question presented in an intelligent manner, additional information is necessary. Accordingly, I shall be obliged if you will have the city real estate agent make an investigation and furnish me information upon the points and matters herein below indicated.

What acts, if any, have been done by the owner or owners of these lots to indicate that the lots are a part of the highway?

What acts, if any, in addition to those above set forth, have been done by the public authorities to indicate that the lots were considered by them as a part of the highway?

Can it be shown that a certain and well-defined line of

travel has existed over these four lots which form the southern half of Belleplaine avenue between the points indicated for a period of at least fifteen years; or, is it true that the line of travel between the points indicated was across the northern half of Belleplaine avenue?

If the main line of travel was over the northern half, then proof of occasional travel over the property outside of the acknowledged highway and outside of the main line of travel for the purpose of avoiding ruts or bad spots is not alone sufficient. Can it be shown that the use by the public has been open, notorious, exclusive, adverse, under claim of right, *continuous, uninterrupted, and with the knowledge of the owner yet without his consent?*

From the matters above enumerated, it appears that the city has had claim of right to said lots 25 and 26 of block one since December, 1898, but what claim or color or right can be shown by the city as to said lots 25 and 26 in block two? There must be something more than mere travel by the public. The user must be under a claim of right by the public and not by the mere acquiescence of the owner. A permissive user never ripens into a prescriptive right.

The proof upon all of the foregoing points above set forth must be *clear and unequivocal*.

As to the sidewalks, water pipes and sewer connections referred to in Mr. Bagby's opinion, when were these put in?

Were the four lots in question assessed for these improvements?

Were the owner or owners of these or other lots adjacent assessed to put in said improvements in or upon the said four lots, or did the owner or owners just give their consent or permission to the making of these improvements, and did they refuse to pay assessments therefor?

Lastly, has there ever at any time been any dedication of these lots, or any of them, for street purposes?

Very truly yours,

JAMES G. SKINNER,
Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,
Corporation Counsel.

OCTOBER 21, 1914.

In re LOCATION OF JOHN WORTHY SCHOOL.

HON. SI MAYER, Chairman, John Worthy School Committee.

Dear Sir:

In your letter of recent date you stated that the Council Committee on Schools, Fire, Police and Civil Service had under consideration the transfer of a portion of what is known as the Gage Farm to the Board of Education so that the John Worthy School, now located at the bridewell, could be erected and maintained thereon. This is in accordance with the recommendation of the Small Parks Commission, which was concurred in by the city council by resolution on June 29, 1914. (Council Journal, pp. 1079 and 1080.) The plan contemplates the transfer of something like seventy-five acres of this property to the City of Chicago, in trust for the use of schools, and it seems that appropriations have been recommended by the Board of Education for this purpose.

When this matter was up about a year ago, in a somewhat different form, an opinion was rendered by this department to the effect that inasmuch as all pupils in the John Worthy School were sent there by the Juvenile Court, which has jurisdiction over the whole county, no valid objection could be raised to the fact that such pupils would be sent outside of the city limits. We further stated, that on the theory that the institution was analogous to a county jail the provision of the statute authorizing the city to make a contract with the county for housing prisoners in the county jail might permit an appropriation for the maintenance of the pupils of such an institution. We expressly stated in that letter, however, that we did not pass on the question of the right of the Board of Education to build and equip such a school as was proposed, because we were advised that the attorneys for the Board of Education would consider that phase of the question. (See opinion to chairman of committee on finance, October 28, 1913.)

Since the question of the appropriation of moneys for this purpose is a matter which must be passed on by the city council, the matter necessarily now comes before that body

in such shape that it is bound to consider this phase of the subject. The precise question presented, is whether in view of the fact that the proposed school will be outside of the city limits, the Board of Education has the right to construct and maintain it.

We find that counsel for the Board of Education, about the time that the former project was under consideration, submitted an opinion to that body which in effect held that the pupils to be taught in the John Worthy School, whether located within or without the city, could, except for the orders of the Juvenile Court committing them to that institution, qualify for attendance in the Chicago city schools; that since the Juvenile Court had the right to send them beyond the city limits, the Board of Education of the city could legally provide instruction for the pupils of the institution which otherwise they would not be able to receive. The conclusion of counsel was, that the Board would be within its powers in erecting buildings for school purposes, furnishing same with the necessary apparatus and providing teachers for the pupils of that institution, even though located beyond the city limits. There are few decisions to be found in the law reports of the State of Illinois which can be looked to as a guide for such a procedure. The opinion of counsel for the Board of Education was based mainly on the case of *Grove v. Board of School Inspectors of Peoria*, 20 Ill. 532. The opinion of the court in that case is far from satisfactory because the court seems to base its decision on the peculiar circumstances existing, and the further fact that an adverse decision might hinder the development and growth of what it characterizes as a noble institution of the State, then in its infancy. We find no later decisions that fortify the position taken by counsel for the Board of Education. Nevertheless, we believe that the views expressed in his opinion are sound, for the reason that the children to be taught in the John Worthy School are actually Chicago children, and are entitled to the benefits of the school system provided for them by statute just as much as the children of the city who are allowed to remain at home.

While, therefore, the matter is not free from doubt, it is our opinion that the city council could sanction an appropriation of the Board of Education for this purpose.

In the letter addressed to us, you ask us also to prepare a form of conveyance with the proviso that at any time that the tract might be abandoned by the Board of Education the property should revert back to the City of Chicago. This request is based on the action of the city council in concurring in the recommendation of the Small Parks Commission which we referred to above. We do not regard that action of the city council as sufficient to warrant the conveyance. Before that can be done, there should be an ordinance or resolution expressly authorizing such a transfer.

The conveyance of the particular property involved for this purpose gives rise to another question also somewhat involved in doubt. Provision is made in the statutes for the conveyance of real estate which is no longer necessary, appropriate or required for the use of the city. But that statute does not apply, and in any event the sale under that statute could only be effected to the highest bidder after advertising. There is another statute which authorizes cities and villages to convey real estate to the school authorities in all cases where such land is held for school purposes by the city. That statute provides that the same may be conveyed and transferred to the proper school officers authorized to hold the same "for the use of the district in which such real or personal estate shall be situated." There are two features about the present conveyance which do not bring it, in all respects, within this statute. One is,—that the land in question is not held by the city for school purposes; the other is,—that the transfer of same would not be for the use of the district in which the land is situated. We do not think that these matters are of such a nature as to preclude the possibility of making the proposed transfer, because if the Board of Education has the right to maintain the school outside of the city limits, the statute will probably be construed as sufficient authority for making the conveyance. This statute provides, among other things, that in case the real estate conveyed shall, at any time, cease to be used for school purposes

for a period of three years, it will have to be conveyed back to the city. We believe it will be well to specify this period in the proviso instead of having the general proviso as at first suggested.

We therefore recommend that the matter of the conveyance be authorized by ordinance, and we have prepared an ordinance for that purpose which we submit herewith.

In conclusion, we beg to call your attention again to the fact that neither of the questions on which we pass in response to your letter can be said to be free from doubt, but it is more than likely, if the matter is brought into the courts, that the decisions will be based on the peculiar circumstances and be favorable to the project in spite of the general rule that where a doubt exists as to the power of a municipality to do a thing, such doubt must be resolved against the exercise of the power. The doubt in the present instance relates more to the mode of exercise of a power than to the power itself, and therefore this rule does not apply. (Dillon on Municipal Corporations, 5th Ed., Sec. 239.)

Yours respectfully,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,
Corporation Counsel.

OCTOBER 21, 1914.

In re STREET RAILWAY'S LIABILITY FOR ELECTROLYSIS DAMAGE.

HON. RAY PALMER, Commissioner of Gas & Electricity, City of Chicago.

Dear Sir:

In your letter of October 9, 1914, addressed to the Corporation Counsel, you ask to be advised if there are any conditions in the merger ordinance of 1913 which can be considered as releasing the surface railway companies from the responsibility of any damage which has been done to city property by stray electrical currents up to the time of the

passage of said ordinance or for a period of two years thereafter.

The only provision in the ordinance of November 13, 1913, which treats of the liability of the surface companies by reason of electrolysis, is contained in Clause (f), Section 8.

Said Clause (f) of Section 8 provides as follows:

“For the purpose of ascertaining any damage by stray electrical currents caused by: first, connections with pipes or other underground metallic work of the City of Chicago or The Sanitary District of Chicago as authorized by clause (b) of this section, and second, the operation of the companies or any of them to any property of the City of Chicago or The Sanitary District of Chicago, after the period provided by clause (d) of this section for electrical rehabilitation, and for the purpose of determining the amount of any damage, and if the companies or any of them is or are responsible therefor, there is hereby created a board, which shall be known as the ‘Board of Electrolysis Claims,’ and shall consist of three members, one of whom shall be the City Electrician, and the second the Chairman of the Board of Supervising Engineers, and the third an engineer appointed by the companies.”

This section cannot be construed as releasing the surface companies from responsibility for damage which has been done either prior to the passage of the ordinance or for a period of two years thereafter. This section merely provides for the establishment after two years, after the passage of the ordinance, of a “Board of Electrolysis Claims.” This board is to determine the amount of damage by reason of electrolysis and the responsibility of the surface companies therefor.

This letter is in consonance with an opinion we wrote you on November 3, 1913. In this opinion we held that the passage of the unification ordinance would not affect the liability of the surface companies to the city or to citizens for damages caused by electrolysis.

Yours very truly,

MAX M. KORSHAK,
Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,
Corporation Counsel.

OCTOBER 22, 1914.

In re ACCEPTANCE OF BAIL BONDS BY POLICE.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

You recently inquired whether it is mandatory upon the police department to accept a satisfactory bond for a prisoner after he has been booked, or whether the police department can refuse to act and leave the prisoner in custody until some judge of The Municipal Court or some other court has accepted bond for him. You state that you want information as to all persons arrested, whether under State charges or for the violation of city ordinances.

Under the statutes as they existed before the enactment and adoption of the act creating The Municipal Court of Chicago no police officer had authority to accept bail for any person arrested for crime or for violating an ordinance. Section 2 of division III of the Criminal Code provides that all recognizances in criminal cases must be taken in open court, or signed by the persons entering into same and approved and certified by the judge, justice of the peace or other officer taking the same. The words "other officer" used in the statute undoubtedly has reference to the sheriff who, in certain cases, may take a bond for a prisoner.

The law was somewhat modified by section 50 of the Municipal Court Act, which provides that:

"In case of the arrest of any person for any *quasi* criminal offense, or for any offense when the punishment is by fine or imprisonment otherwise than in the penitentiary, the chief of police, or any captain or lieutenant or sergeant of police, of the City of Chicago, or any deputy clerk designated for that purpose by an order signed by a majority of the judges of the Municipal Court shall have power to let such person to bail."

Quasi criminal offenses are those which, while not crimes or misdemeanors, are in the nature of crimes and are punishable by forfeitures and penalties. They include *qui tam* actions, prosecutions for bastardy, informations in the nature of *quo warranto*, and statutes for the violation of ordinances. (*Wiggins v. City of Chicago*, 68 Ill. 372.) You will, therefore, observe that for all minor offenses for which the punishment

is anything short of imprisonment in the penitentiary, bail may be accepted by the police.

The section of the Municipal Court Act which places this power into the hands of the police provides further that the exercise of the power so conferred shall be subject to regulations and rules prescribed by the judges of The Municipal Court, and, in pursuance of this provision, the judges of that court have adopted certain rules for the guidance of the police.

While it is true that the wording of the statute is such as to leave some discretion to the police even where a satisfactory bond is offered in the case of these minor offenses, for all practical purposes the provision must be regarded as mandatory. In other words, a person cannot be detained for such minor offense even until the following morning if he offers a satisfactory bond, unless it is reasonably necessary to hold him in custody. Otherwise, the police officer who has authority to accept the bond and refuses to do so would render himself liable to prosecution for false imprisonment.

How strictly the courts interpret the laws providing for admission to bail in all cases short of a capital offense may be gathered from the decision in *Markley v. Griffin*, 109 Ill. App. 212. In that case the police officers did not have the right to accept bail, but it was held that the duty of making a reasonable effort to induce a magistrate or justice to issue a warrant and fix bail rested on them, and that they could be prosecuted for failing to make such effort. The language of the court is as follows:

“Under the statute a person arrested can be detained over night, or over Sunday, before being arraigned, if it is necessary to do so. To show that the detention of appellant in prison over night was necessary, appellee should have made a reasonable effort to induce the magistrate or justice to issue a warrant and fix bail on the date of the arrest.”

In case a police officer is bound to make an effort to induce a judge to issue a warrant and fix bail on the date of arrest when he has no power to accept bail, it follows necessarily that where he has the power to accept a bond he must do so

or render himself liable in a civil action and possibly even a criminal action for false arrest.

It is, therefore, our opinion that the police are bound to accept bail when a satisfactory bond is offered in all cases where an arrest is made for an offense punishable by fine or imprisonment otherwise than in the penitentiary, but that they have no right to accept bail in case of a felony, and are required in such cases only to make a reasonable effort to reach a judge for the purpose of accepting bail when it is tendered.

Yours truly,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,
Corporation Counsel.

OCTOBER 23, 1914.

In re RIGHT TO HOLD TWO PUBLIC POSITIONS AT THE SAME
TIME.

TO THE CIVIL SERVICE COMMISSION OF THE CITY OF CHICAGO.

Gentlemen:

We have your letter of October 6th wherein you inquire if it is lawful for one John Campbell to occupy the position and receive the pay of a building inspector, to which position he was regularly certified by your commission, and also at the same time to hold the office of a member of the board of examiners of mason contractors and receive emoluments thereof.

It is a well established rule of law that no person can hold two incompatible public offices. The acceptance of an office which is incompatible with one already held by the same person is *ipso facto* a resignation of the first office.

Whether two offices are incompatible is usually determined by the nature of the duties of the offices. However, two offices which in their nature are not incompatible may become so by reason of provisions in the statutes or ordinances relating to such offices. In this instance, The Chicago Code of 1911 provides that every employe of the department of buildings shall devote his entire time to such employment and shall not be engaged in any other position or occupation. As a proposition of mathematics it is impossible for any employe

to devote all of his time to one position or occupation and hold another at the same time. We believe that, under the circumstances, the two offices are incompatible and Mr. Campbell cannot hold both.

Very truly yours,
JOSEPH F. GROSSMAN,
Assistant Corporation Counsel.

Approved:
JOHN W. BECKWITH,
Corporation Counsel.

OCTOBER 23, 1914.

In re CAPITALIZATION OF EXPENSE INCURRED IN PAVING AND
REPAVING STREETS.

Barrow, Wade, Guthrie & Company,
53 West Jackson Boulevard,
Chicago, Illinois.

Gentlemen:

In reply to your inquiry concerning the right of the traction companies to capitalize the cost of paving and repaving the streets under the terms of the ordinances heretofore passed by the city and accepted by the companies, we beg to advise you as follows:

Section 15 of each of the ordinances of February 11, 1907, provides in part as follows:

“The company shall, at its own expense, pave, grade and keep in repair, that portion of the streets occupied by it as more specifically provided for in said ‘Exhibit B.’ ”

Exhibit B provides in part as follows:

“MAINTENANCE OF STREETS. The Company, as respects filling, grading, paving, keeping in repair, sweeping, sprinkling, keeping clean, or otherwise improving the streets or parts of streets occupied by its railway, shall fill, grade, pave, keep in repair, sweep, sprinkle, and keep clean and free from snow eight (8) feet in width of all streets and public ways, or portions thereof, occupied by it with a single track railway, and sixteen (16) feet in width of all streets and public ways, or portions thereof, occupied by it with a double track railway. * * *

“PAVEMENT. The Company, upon the order of the Commissioner of Public Works, and approval of the Board

of Supervising Engineers, shall pave, repave, or repair the portions of the streets and public ways which by this grant it is required to keep paved and in repair, whenever and as often as the same shall reasonably require paving, repaving or repairing, and shall at all times keep the surface of all of its paving at least up to the top of the rail.

“The pavement which the Company shall be required to lay down and keep in repair in the portion of any street or way which it is required herein to pave and keep in repair shall be of the following kinds, to-wit:

“First. In all streets or ways in which the Company has in place, at the date of the passage of this ordinance, a good serviceable pavement, it shall repair and maintain the same while serviceable under the direction of the Commissioner of Public Works, as aforesaid.

“Section. Here follows specification as to the method of paving. * * *

Section 7 provides in part as follows:

“Section 7. All of the construction, reconstruction, equipment, re-equipment, extensions and additions to plant and property provided for or required by this ordinance or the exhibits thereto, including underground trolleys, *tunnel re-construction*, new lines, extensions, and other additions to plant and property (but not subways or extensions thereof), shall be done, performed and acquired by the Company under the direction and supervision of said Board of Supervising Engineers, and the cost and expense thereof shall be borne and paid by the Company, but no contract, sub-contract or payment therefor *except as expressly provided in Section 34 hereof* shall be made without the written approval of said Board. * * *

“The said Board of Supervising Engineers shall have the power to determine what work shall be treated as construction, reconstruction, equipment, re-equipment, extensions, new lines, underground trolleys, *tunnel re-construction*, or additions to plant or property to be paid for by the Company out of the capital funds to be provided by it for that purpose, and what shall be treated as maintenance, repairs and renewals, to be paid for out of the gross receipts of the Company from the operation of the street railway system hereby authorized. But any such determination of said Board shall be governed by the following provisions:

“During the three (3) years period of ‘Immediate Rehabilitation’ seventy (70) per cent. of the gross receipts

shall be set apart and shall be used so far as required in defraying the operating expenses, including maintenance and repairs, and the residue of said seventy (70) per cent. shall be applied to the cost of renewals and no part of the cost of any renewal paid for out of such seventy (70) per cent. shall be charged to additional capital, and all expenditures for renewals during said three (3) years in excess of such residue of said seventy (70) per cent. shall be charged to capital account.

“After such three (3) year period of ‘Immediate Rehabilitation,’ the cost of renewals shall be paid as provided in Section 16 hereof, but such expenditures (and only such expenditures) as are made for the purpose of extensions of or additions to property shall be thereafter considered as additions to capital, provided, however, that in the replacement of any principal part of the property, either existing or hereafter acquired, there shall be charged to capital the excess amount that the new property cost over the original cost of the property displaced, excepting that the value of property contained in the appraisal inventory of the property of the Company, referred to in paragraph 1 of Section 20 hereof, shall be used instead of first cost for all property listed in such appraisal inventory.”

Section 20 provides in part as follows:

“RIGHT OF CITY TO PURCHASE AT ANY TIME.

“Section 20. The Company, by the acceptance of this ordinance, shall and does grant to the said City, and the said City hereby reserves to itself the right, upon the first day of February or upon the first day of August of each and any year after such acceptance upon giving at least six (6) months’ previous notice in writing of its intention so to do, to purchase and take over (but only for municipal operation in case of purchase prior to February first, A. D. 1927), the entire street railway system of the Company within the said City, including all property then existing which now constitutes the said street railway system of the Company (except such as is enumerated in ‘Exhibit B’ hereto attached), with all renewals and repairs thereof, and including all the property, franchises, rights and claims described in the appraisal inventory of said Street Railway System as of June 30th, 1906, made by Bion J. Arnold, Mortimer J. Cooley and A. B. du Pont, a copy of which has been filed with the Comptroller of said City on the *fourth* day of *February*,

A. D. 1907, except such as may have been sold or extinguished as authorized by this ordinance, destroyed or impaired (ordinary wear excepted), and all property then existing which has been purchased or acquired by the Company after June 30th, 1906, for use as a part of or in connection with the said system of street railways, the cost of which shall have been certified by the Board of Supervising Engineers, as in this section and in Section 7 hereof provided, and also all extensions of and additions (including underground trolleys, if any), to said street railways made under the provisions of this ordinance, and all rights of every kind under this ordinance in or to any subways or extensions thereof constructed under the provisions of this ordinance:

"PRICE TO BE PAID BY CITY.

"In case the said City shall purchase and take over the street railway system of the Company, as in this ordinance provided, then it shall pay for the same the aggregate of the following items:

"1. The value of the property described in the said appraisal inventory and the value of all the franchises, rights and claims of every description, to construct, maintain or operate street railways in the said City now belonging to the Company, or claimed by it, which said value of such property and all of said franchises, rights and claims is hereby fixed (for the purpose of such purchase) at the sum of Twenty-one Million Dollars (\$21,000,000).

"2. The value of any and all property and equipment and additions thereto supplied, purchased or acquired by said Company as a part of its street railway system, between the 30th day of June, A. D. 1906, and February 1st, A. D. 1907, including any equipment and additions thereto which were in process on June 30th, 1906, of being so supplied, purchased or acquired, but excluding any property described in the aforesaid inventory, and repairs to and maintenance thereof and any expenditures in connection therewith properly chargeable to operating expenses. From such value shall be deducted the value of any property included in said inventory which shall have been lost, destroyed or impaired (ordinary wear excepted) after the 30th day of June, A. D. 1906, and prior to the 1st day of February, A. D. 1907. The value to be allowed under this paragraph number 2 of this section shall be determined by the Board of Supervising Engineers immediately after the assump-

tion by said Board of their duties in supervising the work of reconstruction and re-equipment in this ordinance provided for, and shall be reported by said Board to the City Comptroller of said City; and the amount so reported by said Board, shall be final and binding upon the parties hereto and shall be conclusively held and taken as the value of the property and equipment in this paragraph specified.

“3. The cost of reconstruction and re-equipment of said street railway lines of the Company and of the construction of new lines, extensions, underground trolleys and other additions to property actually paid by said Company at and prior to said purchase by said City and certified by the Board of Supervising Engineers, or incurred for work actually done or materials furnished with the approval of said Board under completed or pending contracts, except those for which special provision is made in subdivision 4 of this section, together with the percentages thereon as in section 7 hereof provided, and all amounts which shall then have been contributed by the Company to the City for the construction of subways or extensions thereof, together with five (5) per cent. of said last named amounts as hereinbefore provided.”

Section 32 provides as follows:

“WAIVER OF RIGHTS.

“Section 32. The Company, in consideration of the grant made by this ordinance, upon the terms and conditions herein expressed, agrees to waive, surrender and release, and by the acceptance of this ordinance, the Company does waive, surrender and release all and every one of the rights and claims of the Company of every kind and nature, in the streets of the said City, other than the rights granted by this ordinance.”

Section 30 of the ordinance provides as follows:

“WARRANTY OF TITLE.

“Section 39. Whenever the City, or its licensee, shall desire to purchase and take over the street railway system of the Company within the said City, as in this ordinance provided, and shall comply with the provisions of this ordinance with respect to making such purchase and payment therefor, the Company shall, by good and sufficient written instruments to that end, transfer to the City, or its licensee, as the case may be, all its said street railway system and property, free from all claims and

liens whatsoever, and the Company shall warrant the title to all of the property so transferred to the City or its licensee, to be free from all claims and liens whatsoever, and also that there are no outstanding rights in the streets or parts of streets occupied by its street railways, in any person or corporation, derived through or under said Company, except the rights of the Chicago General Railway Company on 22nd, Main and Laurel streets under the leases referred to in Section 1 of this ordinance, and if at the date of said purchase there shall exist any defect in or incumbrance upon the Company's title to any of the real estate now owned by the Company, an amount of the purchase price equal to the appraised value of the real estate, the title to which shall be incumbered or defective, as shown by the appraisal inventory made by Bion J. Arnold, Mortimer E. Cooley and A. B. du Pont, hereinbefore mentioned, shall remain in one or more of the depositaries with which the City or its licensee shall deposit the purchase money for said street railway properties until such defects and incumbrances shall be cured or removed, as security to the purchaser against loss by reason of such defects or incumbrances."

While section 14 refers only to sprinkling, sweeping, keeping clean and free from snow the streets, and makes no reference to paving, and section 15 refers only to filling, grading, paving and keeping in repair the streets, and makes no reference to the other subjects referred to in section 14, nevertheless, each of those sections makes specific reference to "Exhibit B" as a part thereof. But "Exhibit B" as heretofore amended under the subject of maintenance of streets, places all of the subjects mentioned in both sections 14 and 15 in the same category.

Section 16 provides for the creation of a renewal fund to take care of renewals and depreciation, but limits the expenditures thereof to payments "for renewals of the said street railways and property." And the same section defines renewals to be "the replacement of any principal part of said street railways or of their equipment or appurtenances."

The city, under section 20, in case of a purchase, is required to pay the company the total amount of all items that are properly chargeable to capital and if paving proper as

distinguished from the foundation thereof were to be charged to capital, it would require the city to pay the company for something in and to which the city has the exclusive title and interest and in which the company has no right, title or interest of any nature, kind or description.

At pages 26 and 27 of the report on the value of the tangible and intangible properties of the street railways made by Bion J. Arnold, Mortimer E. Cooley and A. B. du Pont, as Traction Valuation Commission, and filed December 10, 1906, is found the following tables:

TABLE VII.
SUMMARY OF PHYSICAL AND INTANGIBLE PROPERTY OF THE CHICAGO CITY RAILWAY COMPANY
Value of Paving, \$1,832,558.00.

Franchise Period, as Given in Table VI.	Value of Physical Property.	Value of Intangible Property.	Total without Paving.	Total with Paving.
12 months	\$16,782,147.00	\$3,056,813.00	\$19,838,960.00	\$21,671,518.00
18 months	16,782,147.00	3,754,363.00	20,536,510.00	22,369,068.00
24 months	16,782,147.00	4,434,273.00	21,216,420.00	23,048,978.00
36 months	16,782,147.00	5,848,335.00	22,630,482.00	24,463,040.00
Company's valuation	\$20,103,936.00	\$10,332,228.00		\$30,436,164.00

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TABLE VIII.
SUMMARY OF PHYSICAL AND INTANGIBLE PROPERTY OF THE CHICAGO UNION TRACTION CO.
Value of Paving, \$2,509,477.00.

Franchise Period, as Given in Table VI.	Value of Physical Property.	Value of Intangible Property.	Total without Paving.	Total with Paving.
12 months	\$20,853,629.00	\$4,293,144.00	\$25,146,773.00	\$27,656,250.00
18 months	20,853,629.00	5,262,608.00	26,116,237.00	28,625,714.00
24 months	20,853,629.00	6,218,682.00	27,072,311.00	29,581,788.00
36 months	20,853,629.00	8,161,015.00	29,014,644.00	31,524,121.00
Company's valuation	\$29,294,471.00	\$13,825,040.00		\$43,119,511.00

In the report last above referred to, the commission, at page 7 says:

“LEGAL STATUS OF PAVEMENT.

“As to the second question above noted, viz., what allowance should be made for the pavement on the Companies’ rights of way, your Commission is advised by your special counsel that the legal title to this pavement is in the City of Chicago, and not in the Companies, and that if the Companies are entitled to the value of the same in the pending negotiations, it must be upon the theory that their rights of occupancy in the various streets are of more value when the right-of-way is paved than when it remains unpaved, and that the pavement constitutes no part of the physical value of the Companies’ property. For this reason your Commission has not considered the value of the pavement as a part of the physical property, the value of which property must be supported out of net earnings in determining franchise values.

“While an allowance should possibly be made on account of this pavement in addition to the value placed by your Commission upon the franchises your Commission has preferred to leave the entire matter of pavement to be decided by your Committee, without specific recommendation. The present value of this pavement has, however, been carefully estimated and is given in Tables I and II.”

It appears from page 38 of the printed report above referred to, that the values of the physical and intangible property of the Companies, if the eighteen months period estimated by the Commission is accepted as correct in determining franchise values, will be as follows:

	Without Paving.	With Paving.
Chicago City Railway Co.....	\$20,636,510	\$22,369,068
Chicago Union Traction Co.....	26,116,237	28,625,714
Totals	<u>\$46,652,747</u>	<u>\$50,994,782</u>

At page 61 of the printed First Annual Report of the Board of Supervising Engineers, in determining the value of the properties of the two companies, the Board, in making up the total of original fifty million dollar T. V. C. valuation, included the item of \$1,098,187.00 for paving, whereas as

has been seen the total T. V. C. on the paving considered in connection with the two companies is \$4,342,005.00.

It appears from the proceedings before the Local Transportation Committee that no discussion took place at any time as to what, if anything, would be allowed the company either for intangibles or for paving, but that after other matters had been settled for the most part, the committee announced that they would allow a total valuation of fifty million dollars on the properties of the two companies,—twenty-one million to the Chicago City, and twenty-nine million to the Railways Company. The difference, therefore, between the T. V. C. on tangibles, and fifty million dollars might be credited either to intangibles or paving, or partly to one and partly to the other. And while the Board of Supervising Engineers, in their First Annual Report arbitrarily credited the difference between the T. V. C. on tangibles and fifty million dollars to paving, their action in that regard can have no material bearing on the question now under consideration. We have referred to the foregoing provisions of the ordinances and other matters to which we have invited attention, because they might be considered as having a bearing, in some degree, on the subject under consideration. But we shall now invite attention to those provisions of the ordinance which, in our judgment, more than all others, must control our conclusions.

Section 2 of the Chicago City Railway ordinance provides:

“The company shall proceed at once to reconstruct portions of its track and roadbed and put its entire street railway system, plant and equipment in first class condition, in full compliance with the specifications and provisions for such work in this ordinance and in the exhibit hereto attached, and marked ‘Exhibit B’ and made a part of this ordinance, with the same force and effect as though herein fully set forth, and to operate and maintain said system in accordance with the provisions of this ordinance and of said ‘Exhibit B.’

“Such provisions of this ordinance as are in the nature of specifications shall be given at all times full force and effect, except in cases, if any, in which they conflict with express provisions of ‘Exhibit B,’ in which cases the latter shall prevail. The provisions of this ordinance and

those of 'Exhibit B,' however, shall be construed together, and both, so far as practicable, be given full effect throughout the life of this grant."

The subject of this section is reconstruction, and while the section regards as a part of reconstruction the work upon portions of the company's track and roadbed, pavement as such is not specifically referred to in said section as a part of the work of reconstruction.

True, section 2 makes specific reference to "Exhibit B" and "Exhibit B" makes specific mention of pavement, but it puts a number of things in the same category as pavement, and we therefore feel impelled to treat all things placed in that category in a similar manner, and therefore, if pavement as such is to be treated in a particular manner, sprinkling, sweeping and keeping clean the streets and keeping them free from snow must be treated in the same manner.

A careful study of section 2 and "Exhibit B" in particular, and of the various other provisions of the ordinances in general, forces us to the conclusion that roadbed, as such, should be distinguished from paving, as such, although in a sense a roadbed is a part of the paving. Paving along the companies' rights of way, embodies as one of its essential elements the roadbed. In other words, the roadbed serves a double purpose. It is the bed or foundation upon which the ties and rails of the street railway system are laid and of which the paving proper is essentially no part. Again, this same roadbed constitutes an essential part of what is generally termed "paving." It is likewise the foundation upon which the paving proper is laid. We are therefore forced to conclude that so much of the paving construction as is generally termed the foundation and as is used as the roadbed of the company's tracks, might legitimately be charged to capital as being in effect a part of the plant and property of the company, although the general title thereto is in the city and the company has a special property or right only, therein.

The city undoubtedly has the right to remove the paving proper as distinguished from the foundation thereof, and thereby deprive the company of any use thereof, if a deprivation it be. But the company has such a special property

or right in the foundation or roadbed upon which there is laid in the first instance, the ties and rails of the company, and in the second instance, the paving proper, that in our judgment the city could not deprive the street railway company thereof.

So far as the paving proper is concerned, it is no more an essential part of the plant and property of the company than it would be an essential part of the plant and property of a steam railroad company. So far as the operation of either road is concerned, the paving proper as distinguished from the foundation upon which it is laid, serves no useful purpose and should not, therefore, in our opinion, be charged to capital.

Our conclusions in this regard are induced in a considerable part by a consideration of that portion of section 7 which provides that "after such three (3) year period of 'Immediate Rehabilitation,' the cost of renewals shall be paid as provided in section 16 hereof, *but such expenditures (and only such expenditures) as are made for the purpose of extensions of or additions to property shall be thereafter considered as additions to capital.* * * *"

It is our opinion, therefore, that in so far, and only in so far, as any part of paving is essential to the construction and operation of the street railway lines it may be charged to capital.

Very truly yours,

CHARLES M. HAFT,
Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,
Corporation Counsel.

OCTOBER 23, 1914.

In re TABULATION OF POLICE ELECTION RETURNS BY BOARD OF
ELECTION COMMISSIONERS.

HON. JOHN R. EMERSON, Chairman, Sub-Committee of Committee on Finance.

Dear Sir:

You submitted for the consideration of this department the proposition of the county judge and the Board of Elec-

tion Commissioners with reference to the tabulation and the making of a preliminary abstract of returns of elections with a request for an opinion as to the city's right to make an appropriation available for the election of November 3 for that purpose.

The plan in brief contemplates the collection of the police returns by the agents of the Board of Election Commissioners and the tabulation of same by either the employees of the commissioners or special employees engaged for that purpose through the instrumentality of the City News Bureau, and the making of a quick, accurate abstract of returns. It is not proposed to do away with any work that is at present done by the Board of Election Commissioners, and the preparation of the abstract will be followed later by the formal and precise canvass in accordance with law.

We have carefully considered the matter and have come to the conclusion that the city council would not be justified in making such an appropriation. The matter presents itself in two phases, one of which is the question of the propriety of making such a provision at this time, the other, whether the preparation of such an abstract is a legitimate function of the Board of Election Commissioners.

As to the first part of the question, it would seem as though the city was bound to pay any legitimate expense incurred by the Board of Election Commissioners in and about the conduct of an election, even though there had not been a prior appropriation. Section 1 of Article VII of the act creating the Board of Election Commissioners provides, among other things, as follows:

“All expenses incurred by such board of election commissioners shall be paid by such city. Such salaries and expenditures are to be audited by the county judges, and such salaries shall be paid by the county treasurer, upon the warrant of such county judge, of any money in the county treasury not otherwise appropriated, and such expenditures shall be paid by the city treasurer, upon the warrant of such county judge, out of any money in the city treasury not otherwise appropriated. It shall also be the duty of the governing authority of such counties and cities respectively to make provision for the prompt

payment of such salaries and expenditures, as the case may be.”

It will be seen from the above that the city is bound to pay all expenses incurred by the board upon warrants passed by the county judge out of any money in the city treasury not otherwise appropriated. Leaving out the question of whether or not there is money in the city treasury unappropriated at the present time, it is quite plain that the statute contemplates payment of the warrant after the same is audited by the county judge, and provision must be made for same by the city authorities. Since that is required, there would be no reason for refusing an appropriation if it was known beforehand with certainty that such expense would be incurred, provided, of course, that the expense can be regarded as one that is legitimately incurred by the board in pursuance of its duties.

The case of *Wetherell v. Devine*, 116 Ill. 631, holds that the Board of Election Commissioners must be regarded as a corporate authority having the right to incur expense and indebtedness which the city is bound to meet in accordance with the statute.

While, therefore, no obstacle would present itself in the case of an expense incurred by the Board of Election Commissioners in performing the work required of it under the statutes, the view we express above is based on the fact that we are unable to find anywhere authority for the making of such a preliminary tabulation and abstract as is proposed. The only section of the election act in question which seems to contemplate any quick announcement of the result is section 14 of Article IV, under which the judges of election in the various precincts are required to proclaim in a loud voice at the end of the count the total number of votes for each person voted for in each precinct. At first blush this appears to be for the purpose of announcing the result to the public, which unquestionably demands as quick an announcement as possible, since it is interested in knowing what the result of an election is. But, upon further examination of the law, it appears that the purpose of this proclamation is to furnish a basis for correcting the returns when the can-

vassing board is making the canvass. There is no provision whatever made for any announcement on the part of the canvassing board until its work is complete. Every step to be taken by either the Board of Election Commissioners or the officers in the various precincts is defined with the utmost clearness and exactness, and it must be presumed that if the law contemplated the making of an announcement to satisfy the demand of the people for news concerning the election there would have been some provision made for it. The making of the police returns is purely incidental to the preservation of order at polling places. A policeman being stationed at each one of these, it has been found expedient to call upon him to send an unofficial return to the nearest police headquarters. Such a procedure entails little or no expense, and the propriety of same has never been questioned.

The making of an appropriation of \$7,000 for such a purpose, however, is an entirely different matter, and we are unable to say that it would be legal. Such returns have heretofore been tabulated through the enterprises of the local newspapers. If the people want this work performed by the election commissioners, the proper course to pursue would be to present the matter to the legislature so that the election laws could be amended in this respect.

Yours truly,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,
Corporation Counsel.

OCTOBER 24, 1914.

In re ELEVATED STREET RAILROAD ORDINANCES.

HON. M. FERRY, Commissioner of Public Service.

Dear Sir:

Complying with the request in your communication of recent date, we send you herewith a list of ordinances granted by the city council of the City of Chicago to the several elevated railway companies, with date of passage and designation of the Council Journal in which each of said ordinances may be found.

ORDINANCES OF THE CHICAGO AND OAK PARK ELEVATED RAIL-
ROAD COMPANY.

Note: The name of this Company was prior to April 1, 1904, Lake Street Elevated Railroad Company. Said last-named company on August 30, 1892, acquired the ordinances and property of the Lake Street Elevated Railway Company.

1. December 28, 1888. Council Journal, page 710.

Ordinance to the Lake Street Elevated Railway Company (main line from Canal street to city limits). For provisions in regard to duration of grant see section 24 of said ordinance.

2. November 24, 1890. Council Journal, page 1146.

Ordinance to the Lake Street Elevated Railway Company (extends duration of franchises). For provisions in regard to duration of grant see section 22 of said ordinance.

3. November 24, 1890. Council Journal, page 1154.

Ordinance to Lake Street Elevated Railway Company (main line from Canal street and Crawford avenue to city limits). For provisions in regard to duration of grant see section 25 of said ordinance.

4. December 19, 1892. Council Journal, page 1782.

Ordinance confirming assignment of ordinances of Lake Street Elevated Railway Company to Lake Street Elevated Railroad Company.

5. May 15, 1893. Council Journal, page 273.

Ordinance to Lake Street Elevated Railroad Company (Market street stub, etc.). Term fifty years from the passage of said ordinance.

6. May 22, 1893. Council Journal, page 284.

Ordinance to Lake Street Elevated Railroad Company (amending ordinance of May 15, 1893), adds to section 4 of said ordinance by limiting operation of line to Lake street, and upon Market street from the main line of its road upon Lake street to the south line of Madison street. Also amends section 12 by adding at the end thereof a provision that the city may increase license fee.

7. November 27, 1893. Council Journal, page 1237.

Ordinance to the Lake Street Elevated Railroad Company, amending ordinance passed May 15, 1893, by striking out the sixth clause of section 1 and adding a new clause which provides for a new branch commencing at a point on Lake street between Western avenue on the east and California avenue on the west. Also extends time for company to build to July 1, 1894.

8. October 1, 1894. Council Journal, page 1433.

Ordinance to Lake Street Elevated Railroad Company (line in Lake street from Market street to Wabash avenue). Term fifty years from and after passage of said ordinance.

9. July 13, 1908. Council Journal, page 963.

Ordinance to Chicago and Oak Park Elevated Railroad Company to elevate tracks from 52nd to Austin avenue.

10. March 2, 1914. Council Journal, page 4185.

An ordinance declaring the ordinance of the Chicago and Oak Park Elevated Railroad Company on South Boulevard forfeited.

11. January 26, 1914. Council Journal, page 3715.

Ordinance to Northwestern Elevated Railroad Company, South Side Elevated Railroad Company, the Metropolitan West Side Elevated Railway Company and the Chicago and Oak Park Elevated Railroad Company for platform extension.

12. July 2, 1914. Council Journal, page 1200.

Ordinance repealing council order of July 13, 1908, under which the Chicago and Oak Park Elevated Railroad Company was permitted to send some of its trains into its Market street stub terminal.

13. October 5, 1914. Council Journal, page 1440.

Ordinance terminating all rights of Chicago and Oak Park Elevated Railroad Company in Market street from W. Madison street to W. Lake street.

THE METROPOLITAN WEST SIDE ELEVATED RAILWAY COMPANY.

Note: This company, by a master's deed dated February 1, 1899, acquired the property of the West Side Elevated Railroad Company, to which latter company an ordinance had been granted by the city council of the City of Chicago on April 7, 1892.

1. April 7, 1892. Council Journal, page 2259.

Ordinance to The Metropolitan West Side Elevated Railroad Company (main line Fifth avenue to city limits and branches along 21st street, Milwaukee avenue and North avenue). Term fifty years from passage of city ordinance.

2. June 29, 1900. Council Journal, page 783.

Ordinance to The Metropolitan West Side Elevated Railway Company (Douglas Park line extension, Western avenue to South 40th avenue, Garfield Park line extension, South 48th avenue to 52nd avenue). Term fifty years from and after the 16th of April, 1892.

3. March 18, 1901. Council Journal, page 2429.

Ordinance to The Metropolitan West Side Elevated Railway Company (Garfield Park line—52nd avenue to Austin avenue). Term until April 7, 1942.

4. June 23, 1902. Council Journal, page 732.

Ordinance to The Metropolitan West Side Elevated Railway Company (Market street to Fifth avenue). Term until the 7th day of April, 1942.

5. February 23, 1905. Council Journal, page 2643.

Ordinance to The Metropolitan West Side Elevated Railway Company permitting contract with Aurora, Elgin & Chicago Railway Company.

6. March 30, 1906. Council Journal, page 3303.

Ordinance to The Metropolitan West Side Elevated Railway Company (Humboldt Park line extension, Chicago, Milwaukee & St. Paul Railway Company's tracks to North 72nd avenue. Douglas Park line extension from South 40th avenue to South 46th avenue). Term fifty years from and after the 16th day of April, 1892.

7. November 30, 1908. Council Journal, page 1939.

Ordinance to The Metropolitan West Side Elevated Railway Company for two additional tracks across 52nd avenue (Garfield Park line). Duration of grant for the same term as provided in ordinance of 3/18/1901.

8. February 8, 1909. Council Journal, page 2771.

Ordinance directing The Metropolitan West Side Elevated Railway Company to widen draw of bridge.

9. March 1, 1909. Council Journal, page 2920.

Ordinance to The Metropolitan West Side Elevated Railway Company (amending section 16 of ordinance of April 7, 1892). Gives permission to conduct amusement enterprises in property at Paulina and West Van Buren streets belonging to said company.

10. March 29, 1909. Council Journal, page 3619.

Ordinance to The Metropolitan West Side Elevated Railway Company (amending ordinance of March 30, 1906, which extends time in which to build Humboldt Park line extension from Chicago, Milwaukee & St. Paul Railway Company's tracks to 72nd avenue).

11. January 18, 1897. Council Journal, page 1447.

Ordinance to The Metropolitan West Side Elevated Railroad Company and Lake Street Elevated Railroad Company to raise tracks at Rockwell street.

12. January 24, 1898. Council Journal, page 1488.

Requiring The Metropolitan West Side Elevated Railroad Company to raise tracks at point between Paulina and Wood streets.

13. February 11, 1901. Council Journal, page 2118.

Requiring The Metropolitan West Side Elevated Railway Company to raise tracks at West Kinzie street.

14. July 7, 1902. Council Journal, page 959.

Requiring The Metropolitan West Side Elevated Railway Company to raise tracks at West 16th street.

15. October 22, 1906. Council Journal, page 1785.

Requiring The Metropolitan West Side Elevated Railway Company to raise tracks at South 46th avenue.

16. September 3, 1907. Council Journal, page 1512.

Requiring The Metropolitan West Side Elevated Railway Company to raise tracks at South Campbell avenue.

ORDINANCES OF THE NORTHWESTERN ELEVATED RAILROAD COMPANY.

1. January 8, 1894. Council Journal, page 1445.

Ordinance to the Northwestern Elevated Railroad Company (main line Monroe street to city limits). Term fifty years from passage of said ordinance.

2. June 24, 1895. Council Journal, page 536.

Ordinance to The Metropolitan West Side Elevated Railroad Company (line on Fifth avenue to Harrison street) amends ordinance passed January 8, 1894.

3. July 13, 1896. Council Journal, page 687.

Ordinance to the Northwestern Elevated Railroad Company extending time for completion.

4. December 29, 1897. Council Journal, page 1227.

Ordinance to the Northwestern Elevated Railroad Company extending time for completion.

5. January 4, 1899. Council Journal, page 1218.

Ordinance to the Northwestern Elevated Railroad Company extending time for completion.

6. January 8, 1900. Council Journal, page 2155.

Ordinance to the Northwestern Elevated Railroad Company extending time (compromise ordinance).

7. January 15, 1900. Council Journal, page 2165.

Amending ordinances of January 8, 1900, to the Northwestern Elevated Railroad Company.

8. January 16, 1905. Council Journal, page 2116.

Ordinance to the Northwestern Elevated Railroad Company (for Ravenswood extension). Term until January 8, 1944.

9. July 1, 1907. Council Journal, page 948.

Ordinance to the Northwestern Elevated Railroad Company and Chicago, Milwaukee & St. Paul Railway Company for joint operation on Evanston division. Term until January 8, 1944.

10. July 17, 1908. Council Journal, page 1310.

Ordinance to the Northwestern Elevated Railroad Company for North Water street stub. Term until January 8, 1944.

11. July 18, 1910. Council Journal, page 1252.

An ordinance requiring all elevated roads to provide adequate seating facilities on platforms.

12. February 14, 1913. Council Journal, page 3766.

Ordinance to the Northwestern Elevated Railroad Company granting it the right to construct, maintain and operate an additional track at the intersection of its main line and its Ravenswood branch line. Term same as that of ordinance of January 8, 1894, to same company.

ORDINANCES OF THE SOUTH SIDE ELEVATED RAILROAD COMPANY.

Note: In 1897 the South Side Elevated Railroad Company succeeded to the property and franchises of the Chicago & South Side Rapid Transit Railroad Company, to which company the city council of the City of Chicago had theretofore granted certain ordinances for the construction and operation of an elevated railroad in the south division of the City of Chicago. The Englewood Elevated Railroad Company, which was by the ordinance of March 16, 1903, hereinafter listed, authorized to construct and operate an elevated railroad along certain routes in Englewood, was consolidated with the South Side Elevated Railroad Company in 1906 and conveyed all its property to the latter in 1906.

1. March 26, 1888. Council Journal, page 741.

Ordinance to the Chicago & South Side Rapid Transit Railroad Company (main line from Congress street to 39th street). Term fifty years from passage of said ordinance.

2. April 2, 1891. Council Journal, page 1848.

Ordinance to the Chicago & South Side Rapid Transit Railroad Company (main line from 39th street to Jackson Park). Term fifty years from March 26, 1888.

3. April 7, 1892. Council Journal, page 2257.
Ordinance to the Chicago & South Side Rapid Transit Railroad Company (line on 63rd street). Term fifty years from March 26, 1888.
4. May 17, 1897. Council Journal, page 162.
Ordinance affecting South Side Elevated Railroad Company which permits connection with the loop.
5. March 16, 1903. Council Journal, page 2712.
Ordinance in which South Side Elevated Railroad Company, Chicago Junction Railroad Company and Englewood Elevated Railroad Company are interested (for Stock Yards, Englewood and Kenwood branches). Term until March 26, 1938.
6. June 19, 1905. Council Journal, page 583.
Ordinance to South Side Elevated Railroad Company for 63rd street switch. For the remainder of the term granted to the Chicago & South Side Rapid Transit Railroad Company under date of March 26, 1888.
7. June 26, 1905. Council Journal, page 692.
Ordinance to the South Side Elevated Railroad Company amending Stock Yards branch ordinance passed 3/16/1903.
8. June 26, 1905. Council Journal, page 727.
Ordinance to the South Side Elevated Railroad Company. Amends Stock Yards branch ordinance of June 19, 1905, by changing one word of same.
9. December 3, 1906. Council Journal, page 2223.
Ordinance to South Side Elevated Railroad Company. Amends Stock Yards branch ordinance passed March 16, 1903, by amending section 19 in the right-hand column of page 2721 in the fifth line by striking out the figures "1906" and inserting in lieu thereof the figures "1907."
10. December 16, 1907. Council Journal, page 3064.
Ordinance to South Side Elevated Railroad Company. Amends Stock Yards branch ordinance passed March 16, 1903, by striking out the figures "1908" in the seventh line of the left hand column on page 2722

of said Council Journal and substituting in place thereof the figures "1909",

11. February 15, 1909. Council Journal, page 2834.

Ordinance to South Side Elevated Railroad Company for 40th street switch. Term twenty years from date of this ordinance.

UNION LOOP ORDINANCES.

Note: A "Preliminary Statement" appearing in a compilation to November 1, 1911, of the ordinances of the elevated railway companies, prepared, as we are informed, under the direction of the officials of the companies, is here copied for your information:

"The Union Elevated Railroad Company was organized on November 22, 1894, for the purpose of building and operating an elevated railroad in the business center of the city to serve as a terminal loop for the four elevated systems. It obtained an ordinance granting it the right to construct a line on Wabash avenue from Lake street south to Harrison street in 1895, this line to constitute the east side of the loop. Under an ordinance of October 1, 1894, the Lake Street Elevated Railroad Company had obtained the right to build a line in Lake street from Market street to Wabash avenue and by contract this right was conveyed to the Union Elevated Railroad Company to be used for the north side of the loop. The right to construct a line on Fifth avenue from the river as far south as Harrison street had been granted to the Northwestern Elevated Railroad Company by an ordinance of June 24, 1895, and by contract of August 9, 1895, the right to build and use that portion of this line between Lake street and Harrison street for the west side of the loop was conveyed to the Union Elevated Railroad Company by the Northwestern Company.

"The Union Consolidated Elevated Railway Company was incorporated in March, 1896, and obtained an ordinance in June of that year giving it the right to build and operate a road in Van Buren street from Wabash avenue west to a point about two hundred feet east of

Halsted street, together with a branch in Market street extending north to the right of way of the Metropolitan West Side Elevated Railroad Company. The Union Elevated Railroad Company acquired from this Union Consolidated Company the right to build and operate that portion of its authorized line in Van Buren street from Wabash avenue to Fifth avenue by contract of July 6, 1896, and thus completed its ordinance rights covering the entire loop line. The loop when constructed was leased by the Union Elevated Railroad Company to the four other companies jointly, and the operation of the line has been carried on by them under the terms of the said lease.

"In 1901 all of the property of the Union Elevated Railroad Company was sold and conveyed to the Northwestern Elevated Railroad Company by a bill of sale dated September 3, 1901, and recorded in the Recorder's Office of Cook County on the same day in Book 7562 of Records, at page 320, and by deed of general conveyance dated September 3, 1901, and recorded in the Recorder's Office of Cook County the same day in Book 7646 of Records, at page 26.

"The capital stock of the Union Consolidated Elevated Railroad Company is all held in trust for the Northwestern Elevated Railroad Company. The line of the Union Consolidated Company in Van Buren street from Fifth avenue to Market street and north on Market street to the right of way of the Metropolitan is leased to the Metropolitan West Side Elevated Railway Company by a lease dated April 15, 1908."

1. October 1, 1894. Council Journal, page 1433.

Ordinance to the Lake Street Elevated Railroad Company (north side of loop). Term, fifty years from passage of said ordinance.

2. June 24, 1895. Council Journal, page 536.

Ordinance to the Northwestern Elevated Railroad Company (west side of loop). Amends ordinance of January 8, 1894.

3. October 14, 1895. Council Journal, page 1047.

Ordinance to Union Elevated Railroad Company (east side of loop). Term fifty years from passage of said ordinance.

4. June 29, 1896. Council Journal, page 579.

Ordinance to the Union Consolidated Elevated Railway Company (south side of loop). Term fifty years after October 7th, 1895.

5. July 28, 1913. Council Journal, page 1643.

Ordinance to the four elevated railroad companies re through routing, extension of platforms in loop, transfer bridges, etc.

Yours truly,

LEON EDELMAN,

Assistant Corporation Counsel.

OCTOBER 24, 1914.

In re EFFECT OF 1913 UNIFICATION ORDINANCE ON ACCOUNTING.

*Messrs M. & L. W. Scudder,
Monadnock Block,
Chicago.*

Gentlemen:

In reply to your inquiry of October 8th, relative to the effect of the ordinance of 1913 upon the accounting features of the ordinances of February 11th, 1907, I beg to advise you as follows:

The provisions of the 1913 ordinance which control the subject of your inquiry are to be found in section 3 thereof, to-wit:

“Section 3. The basis of accounting as between the companies and the City of Chicago, which has been in effect for the past period of six years and over, under the 1907 and subsequent traction ordinances, with reference to the renewal, maintenance, operating and other funds, and any other questions of accounting, shall be continued as heretofore, except as the same are expressly or by necessary implication modified by this ordinance, subject to such revision as the Board of Supervising Engineers may from time to time prescribe to carry out the provisions of said ordinances, provided that the dis-

tribution in the accounts of the companies of the cost of purchased power shall continue as heretofore; and the Board of Supervising Engineers shall hereafter have the power (when and to the extent the Board deems it proper) to require the respective companies to increase the monthly payments into their respective funds for renewals and depreciation (provided for in the traction ordinances), up to ten (10) per cent. of the gross receipts of the respective companies for such months respectively; but nothing in this section contained shall be construed as curtailing in any manner the obligations of the companies, or the power of the Board of Supervising Engineers, under the existing traction ordinances with respect to expenditures and reserve funds whether for maintenance and repairs, or for renewals and depreciation. Any further questions of accounting not covered by the express terms of this ordinance shall be determined by the Board of Supervising Engineers; provided, however, that this section shall not apply to any pending litigation between the companies, or either of them, and the City, and shall not apply to any claims in dispute or that may hereafter arise between the City and said companies, or either of them, other than said questions of accounting in this section mentioned; and also shall not apply to the claim of the City against the Chicago Railways Company, with reference to payment for the water main formerly in the old La Salle street tunnel."

This department has not had occasion heretofore to construe this section, although, in response to a written request for an opinion on the subject of electrolysis as affected by the 1913 ordinance, and in transmitting a draft of an ordinance prepared pursuant to and based upon a memorandum therefor furnished by the local transportation committee, I took occasion, out of what may have been an excess of caution, to volunteer a word of warning concerning this section but, as appears from my opinion of October 27th, 1913, it was a warning as distinguished from a construction of the ordinance, and, after that warning was given, section 3 of the ordinance in question was amended in several material particulars.

It appears from the proceedings had before the local transportation committee that only two questions of accounting were at any time or in any way presented or discussed.

Those two questions were fines and charging power, in part, to renewals.

The general rule is that ordinances of the kind of which section 3 in question is a part must be construed most favorably on behalf of the public.

From an examination of the ordinance itself, I am of the opinion that it clearly was not the intention of the members of the council to legislate on some subject as to which they had no information, but, even if there were any doubt on the subject, I would feel required to resolve that doubt in favor of the City, under the rule just stated.

I conclude therefore that it was the purpose of section 3 of the ordinance of 1913 to amend the ordinances of 1907 only in such particulars as were therein specifically mentioned or, at most, only as to such matters of accounting as were specifically brought to the attention of the council.

It seems to be the purpose of section 3 to ratify some matter or matters of accounting, the correctness of which had been questioned. The well-established rule with reference to the ratification is that a party cannot by his words or acts be held to have ratified that of which he possessed no knowledge, and neither the city council nor the local transportation committee had any knowledge of any questions of accounting except those pertaining to fines and charging a percentage of power purchased to renewals.

The well-established rule of construction is that the language of a proviso limits and controls any language on the same subject which precedes it. Applying this rule to the section in question, I find that the concluding portion of the section contains the proviso that the section in question shall not apply to any claims in dispute that might arise after the passage thereof.

I therefore advise you that the ordinance of November 13th, 1913, has no effect upon the ordinances of February 11th, 1907, which constitute the basis of accounting between the City and the companies, except in the particulars specifically enumerated herein, and the same is true as to the methods of accounting.

We assume, of course, that you are to treat your report as

based upon a pure matter of accounting under the 1907 ordinances, so that your report will indicate what the true result is under the 1907 ordinances unaffected by the 1913 ordinances. Although, you will also so draft your report that it will be possible to determine what the result would be in case the 1913 ordinance is to be construed as affecting the accounting features of the 1907 ordinances. In short, that you will so word your report that the results can be ascertained when the lawyers or the courts determine what effect, if any, the 1913 ordinance has on the accounting features of the 1907 ordinances.

Very truly yours,
JOHN W. BECKWITH,
Corporation Counsel.

OCTOBER 26, 1914.

In re LICENSES FOR FORTUNE TELLERS.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

You referred to this department a letter from the city collector stating that there is no ordinance providing for the licensing of fortune tellers, and that he is, therefore, without means of knowing to what extent it is being practiced, and you have inquired whether there is no provision in the ordinances regulating this business.

There are three sections of The Chicago Code of 1911 which were designed to prohibit improper practices under the guise of fortune telling, palmistry or other so-called occult sciences. But they are not in force, owing to a decision of the Supreme Court rendered in December, 1912.

Section 1987 of The Code prohibits persons from advertising by sign, circular, newspaper or in any other way to tell fortunes, to find or restore lost property, to locate oil wells or mines or give advice by means of occult or psychic powers, etc.

Section 1988 forbids obtaining money or property from another by fraudulent devices and practices in the name of or by means of spirit mediumship, palmistry, card reading, etc.

Section 1989 prohibits any person from giving an exhibition in the name of spiritualism where fraud or deception of any kind is practiced.

A prosecution was brought against a person calling himself "Professor Ross" under section 1988, and on his being dismissed the case was taken to the Supreme Court. That court decided, in *City of Chicago v. Ross*, 257 Ill. 76, that if the city council had power to enforce section 1988 it was under the 45th clause of Article V, section 1, which authorized the city council, among other things, to suppress all fraudulent devices and practices.

The court held, however, that under the strict construction which must be given to the statute the power did not exist. The same ruling must necessarily apply to sections 1987 and 1989. Consequently, we have at the present time no valid ordinance which can be invoked either to license or regulate or to prohibit fortune telling.

An attempt was made to remedy this defect by introducing a bill at the last session of the legislature extending the power of the city in this respect. This bill was recommended by the city council. It failed to pass, however, and the matter still stands as indicated above.

Yours respectfully,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,
Corporation Counsel.

OCTOBER 26, 1914.

In re GAMBLING DEVICES.

HON. JAMES S. McINERNEY, Prosecuting Attorney.

Dear Sir:

We acknowledge receipt of your communication of October 17, 1914, requesting an opinion as to whether or not certain machines, described in the attached circular, are gambling devices.

The device as described in the accompanying circular is as follows:

“The different ways of playing our

BASE BALL MACHINE

1. Any number of men play machine for one cent or more, and the party with the lowest score buys the drinks or cigars for the players.

2. Any number of men play machine for one cent or more, and the party with the highest score gets whatever they play for.

3. A special reward might be offered by the owner of the machine either in cash or in merchandise, for each home run that is made.

NICKEL MACHINE.

1. Party playing machine for a nickel, receives five cents worth of Merchandise on any play, and for a home run, only receives a special reward.

2. Party playing machine for a nickel receives one cigar for one base hit, 2 cigars for 2 base hits, 3 cigars for 3 base hits, 4 cigars or more for home run, and nothing for out, strike and balls.”

The powers of the City of Chicago relative to the control and suppression of gambling is derived from Clause 45, Section 1, Article V, Chapter 24 R. S. of Illinois of 1911, and is in part as follows:

“To suppress gaming, gambling houses, lotteries, and all fraudulent devices and practices for the purpose of gaining or obtaining money or property.”

The statute forbidding lotteries is as follows:

“SETTING UP OF.) §180. Whoever sets up or promotes any lottery for money or by way of lottery disposes of any property of value, real or personal, or under pretense of a sale, gift or delivery of any other property, or any right, privilege or thing whatever, disposes of, or offers or attempts to dispose of any real or personal property with intent to make the disposal of such real or personal property dependent upon or connected with any chance by dice, lot, numbers, game, hazard or other gambling device, whereby such chance or device is made an additional inducement to the disposal or sale of said property, and whoever aids, either by printing or writing, or is in any way concerned in the setting up, managing or drawing of any such lottery, or in such disposal, or offer or attempt to dispose of property by any such chance or device, shall, for each offense, be fined not exceeding

\$2,000." Chapter 38, Hurd's Rev. Stat. (Criminal Code.)

The validity of this statute has been repeatedly upheld in our Supreme Court as will be seen by reference to the case of *Dunne v. The People*, 40 Ill. 465, wherein on page 467, the court held that a lottery is "a scheme for the distribution of prizes by chance."

And in the case of *Thomas v. The People*, 59 Ill. 160, the court, on page 164, in commenting upon a scheme of certain tickets, condemned the same as a lottery in the following language:

"Even if the ticket to the concerts and lectures, and an engraving, were intrinsically worth \$5, the scheme would still be a lottery. The hand bill advertisement delivered with each ticket held out inducements to purchase. * * *

"Had not this plan been watched by the vigilance of the law, can there be any doubt that numerous persons would have purchased tickets, prompted by the hope of gain? Are there not inseparably connected with it the same fascination and excitement and intense desire for gain, which gather around the gaming table?

"Like any other species of gambling, lotteries have a pernicious influence upon the character of all engaged in them."

Section 985 of The Chicago Code of 1911, in reference to Lotteries and Policy Games, is in part as follows:

"No person shall sell, offer for sale, vend, barter, exchange, give away, deal in or in any way dispose of or redeem any ticket, order slip or device of any kind for or representing any number of shares or any interest in any lottery, policy or scheme of chance of any kind or description by whatever name, style or title the same may be denominated or known, and whether located or to be drawn, paid or carried on within or without the limits of the City of Chicago, or whether such purported drawings be real or imaginary."

"No person shall patronize, frequent or be found in any place, building, room or establishment kept, occupied or used for policy playing, for policy or lottery drawings, or for the sale of what are commonly called lottery or policy tickets or slips, or in which are kept any paper, prints, writings, numbers, devices, policy slips, policy

tickets, policy sheets or article of any kind, such as are commonly used in carrying on, promoting or playing the game or scheme commonly called policy.”

The United States courts in a late case entitled *United States v. One Box of Tobacco*, reported in 190 Fed. Rep., p. 731, in passing upon a scheme somewhat similar to the subject-matter of this opinion, decided that it was a lottery. The scheme therein was the selling of 100 cuts of tobacco for 5 cents each, and in one of the 100 packages was a prize number which entitled the purchaser to 50 cents in cash to be redeemed by the manufacturer. On page 733 the rule is given and authorities quoted as follows:

“Suppose instead of placing a redeemable tag in the cut of tobacco, the claimant had placed therein a silver half dollar. The absolutely decisive contingency would lie in the choice of cuts, and the prize would be his who selected the cut containing the coin. Could it be said that the possession of the coin was not dependent upon the event of a lottery? Under this very clever scheme the lottery is conducted in the shop of the retailer. The tickets are the 5-cent cuts of tobacco, each of which, under the testimony in the case, is worth at retail the price charged for it, and one of which out of every 100 is worth 50 cents in addition. The possession of this prize is determined by chance, and the case seems in principle not different from that of *Reg. v. Harris*, 10 Cox’s C. C. 352. Still more nearly in point is the case of *Taylor v. Smetter*, 11 Q. B. D. 207, where packets, each containing a pound of tea, were sold at so much per packet. In each packet was a coupon entitling the purchaser to a prize; said prizes varying in value and in character. The tea was admittedly worth the money paid for it. In this case the purchaser of each packet was entitled to a prize, the nature and value of which was determined by the coupon hidden in the packet. It was held that this was a lottery. It would assuredly not have been less so had only one packet of tea in every 100 contained a coupon calling for a definite value.”

The following decisions, which are also in point, are taken from Vol. IV of Words and Phrases, pages 3024, 3028 and 3029:

“GAMBLING—GAMING.

Whenever money or other valuable thing is hazarded and may be lost, or more than the value obtained, and

depended upon chance, the transaction is gambling. *State v. Smith*, 10 Tenn. (2 Yerg.) 272, 281."

"SELLING PRIZE PACKAGES.

The selling of prize candy packages in which a certain amount was put, at risk on the chance of getting more or less than its value is gaming. *Eubanks v. State*, 50 Tenn. (3 Heisk.) 488, 490 (citing *Bell v. State*, 37 Tenn. 5 Sneed 407.)"

"GAMBLING DEVICE.

A gambling device is defined to be anything which is used as a means of playing for money or other thing of value, so that the result depends more largely on chance than skill. *In re Lee Tong* (U. S.), 18 Fed. 253, 257."

In the case of *Price v. Burns*, 101 Ill. App., p. 418, the litigation is about a slot machine having many similar features to the above described base ball machine, and the court therein held it was a gambling device and a violation of both the city ordinance and sections 127, 128, 133, 137f, 137g, 137h, Hurd's Rev. Ed. 1901.

Therefore, in view of the law as stated, we are of the opinion that this base ball machine is a gambling device and a lottery scheme and a violation of both the Illinois Statutes and the ordinance of the City of Chicago forbidding the use of gambling devices or having the same in possession.

Yours respectfully,

M. W. CAGNEY,

Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,

Corporation Counsel.

OCTOBER 27, 1914.

In re CONSTRUCTION OF SECTIONS 7 AND 16 OF THE 1907 TRACTION ORDINANCES.

Messrs. Barrow, Wade, Guthrie & Company,
Monadnock Block,
Chicago.

Gentlemen:

In reply to your request of September 26th, 1914, we answer the five interrogatories therein contained, as follows:

1. Sections 7 and 16 of the ordinances of February 11th, 1907, should be construed together so as to give full effect to the language of each if possible, but, where the language of the two sections is found to be so inconsistent that either one or the other must give way, then the language of section 16 would prevail. Carrying out this idea, we are of the opinion that the cost of the maintenance of each company's "entire equipment, plant and appurtenances" should be regarded as an operating expense as distinguished from a charge to capital. It should be noted, however, that expenditures of the renewal fund are regarded as an operating expense as distinguished from an expenditure of capital. We therefore advise you that charges for maintenance of way and structures, maintenance of equipment, consisting of repairs to work cars, tools, etc., should not be charged to capital, but might or might not be properly chargeable to renewals, depending on the circumstances of the particular case.

2. We believe that you will find your second question fully answered by an opinion, bearing date June 15, 1914, which we have heretofore rendered to His Honor the Mayor and of which you have been furnished a copy, which opinion will be found beginning at page 17 of the pamphlet bearing date June, 1914, entitled, "Proceedings before Committee on Local Transportation *in re* Investigation of Board of Supervising Engineers, etc."

3. It is our opinion that the effect of section 7 regarded as an entirety is to limit the expenditures which may be charged to capital account to such expenditures "as are made for the purpose of extensions of or additions to property."

4. In answering your fourth inquiry, it must be borne in mind that the relationship between each of the street railway companies and the City is in a sense that of co-partners, and that, while the cost of a car to the company may be \$10,000, the cost of that same car to the co-partnership is \$11,500, owing to the fact that sections 7 of the ordinances provide that "to the actual amount paid by the company in and about carrying out each and all of the requirements of this section shall be added 10% of such amount as a fair and proper allowance to the company for conducting the said work and furnishing said equipment, and 5% for its services in procuring funds

therefor including brokerage." Therefore, this 15% is as much a part of the cost of a car so far as the co-partnership is concerned as would be the amount paid for freight on said car in transporting from Philadelphia to Chicago. Our conclusion in this regard is further emphasized by the provisions of the ordinances with reference to interest return on capital investment. Section 25 of Railways ordinance—section 24 of Chicago Ordinance—fixes the cost of a car upon which interest is to be paid at 5% at the amount which the City would be required to pay in case of a purchase of the lines, which would be the original cost to the street railway company plus the 15% or, in case of a \$10,000 car purchased by the company, \$11,500. Therefore, in case of the replacement of the \$10,000 car, referred to by you in your fourth question, by a car costing \$12,000, it is our opinion that \$11,500 of such cost of the \$12,000 car should be paid out of renewals and \$500 out of additional capital.

5. As we endeavored to indicate in an opinion to the mayor, hereinbefore referred to, we construe the ordinances of February 11, 1907, to mean that such of the items mentioned in paragraphs 2 and 3 of your letter as pertain to the general conduct of the business of the company including operation but which may incidentally pertain to construction should be charged to operation, but that such items as pertain solely to construction, as distinguished from operation and are not properly chargeable to capital, should be charged to the company individually, compensation for which it receives in the form of 10% allowed to it under section 7 of the ordinance "for conducting the said work and furnishing said equipment."

Very truly yours,

CHARLES M. HAFT,
Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,
Corporation Counsel.

OCTOBER 28, 1914.

In re CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY FOR
CHICAGO AUTOMOBILE TRANSPORTATION COMPANY.

Hon. Carter H. Harrison,
Mayor.

Dear Sir :

The letter of Mr. S. E. Lyon, President, Chicago Automobile Transportation Company, dated October 21, 1914, addressed to your Honor and by you referred to the law department, has been referred to the undersigned for opinion.

This letter sets forth that you, as Mayor, have sent a request to the Public Utilities Commission to take no action upon the application of the company for a certificate of convenience and necessity until the City Council shall have taken action upon the subject-matter; that the commission has informed the company that no action will be taken for the present; that upon the best legal advice obtainable the company believes that the certificate is nothing more than a license to commence business and that affirmative action will have to be taken by the city and the three park commissions before the company can actually operate; that Section 55 of the Utilities Act provides that no public utility not owning a city or village franchise at the time the Act goes into effect may transact any business until it shall first have obtained such certificate; that the company cannot complete its organization, issue stock, build equipment, etc., without first complying with all the requirements of law; that the issuance of the certificate cannot alter the legal position of the city as to any right it may have to exercise control over streets; and accordingly requests an opinion from the Corporation Counsel in order that the company may be fully advised as to the proper steps to be taken in order to proceed with its plan of service as soon as possible.

The position taken by you in your letter to the State Public Utilities Commission and the adoption of your view by that body is correct and should be adhered to. Certificates of public convenience and necessity are something new to the law of Illinois in the regulation and control of public utility corporations. There are no adjudicated cases upon the subject

in this state and it therefore becomes necessary to examine into the nature and purpose of such certificates and into the laws of other states after which Section 55 of the State Public Utilities Act is modeled.

Such a certificate is more than a mere license to commence business. It means that the body which issues it has passed upon and determined such questions as whether the public needs the proposed service, whether or not the public is already adequately supplied by the same or similar service, and whether the public will be inconvenienced or inconvenienced by its construction, operation, and the payment of reasonable profits upon the investment involved, because after all it is the public that pays the dividends. A mere license is the grant of a privilege to conduct a business which may or may not be of a public utility character and with no necessary reference to the convenience or inconvenience of the public or whether the community will afford sufficient patronage to make probable the financial success of the venture.

The state body should be the last body to pass upon this because it can then have the benefit of the local body's action in determining some of the considerations above set forth, and it is a well known principle of administrative law that a local body is often more competent to pass judgment upon the necessity of a local service than a more distant authority.

Section 55 of the Utility Act is as follows:

“§55. CERTIFICATE OF CONVENIENCE AND NECESSITY.)

No public utility shall begin the construction of any new plant, equipment, property or facility which is not in substitution of any existing plant, equipment, property or facilities or in extension thereof or in addition thereto, unless and until it shall have obtained from the commission a certificate that public convenience and necessity require such construction.

“No public utility not owning any city or village franchise nor engaged in performing any public service or in furnishing any product or commodity within this State at the time this Act goes into effect shall transact any business in this State until it shall have obtained a certificate from the commission that public convenience and necessity require the transaction of such business.

“Whenever after a hearing the commission determines that any new construction or the transaction of

any business by a public utility will promote the public convenience and is necessary thereto it shall have the power to issue certificates of public convenience and necessity.

“Such certificates may be altered or modified by the commission, upon its own motion or upon application by the person or corporation affected. Unless exercised within a period of two years from the grant thereof authority conferred by a certificate of convenience and necessity issued by the commission shall be null and void.”

In comparing this section with the laws of other states, I may say that I was very familiar with the drafting of the Illinois Public Utilities Act; that I was in constant touch with those who had this work in hand for a period of several months; that I personally know that the Illinois Act is very largely patterned after the California Act and that the California law was patterned after the New York law.

The Public Service Law of New York provides that before such a certificate shall be issued a certified copy of the charter of the corporation shall be filed in the office of the commission, together with a verified statement showing that the company has received the required consent of the proper municipal authorities, and the California law enacts that every applicant for a certificate shall file in the office of the commission evidence to show that the applicant has received the required consent, franchise or permit of the proper city, municipal or other public authority. If the public utility desires a right or privilege under a franchise or permit which it contemplates securing but which has not yet been granted it may apply to the commission of that state for a preliminary order to the issue of the certificate and the commission may make an order declaring that it will thereafter, upon application, issue the desired certificate upon such terms and conditions as it may designate after the public utility has obtained the contemplated franchise or permit, and upon the presentation of evidence to the commission that such franchise or permit has been secured the commission thereupon issues the desired certificate.

The substance of the New York and California laws above set forth make it clear that the license or permit from the

local body should be obtained before the commission will issue the certificate of convenience and necessity.

I do not agree with counsel for the Chicago Automobile Transportation Company that it cannot complete its organization and issue its stock before it has obtained the certificate of public convenience and necessity from the commission. That is not the proper construction to be placed upon the Act. That is not the transaction of business referred to in Section 55, but the transaction of business there meant is the building of equipment, construction of plant, and the actual transportation of persons or property. These latter things may not be done until the certificate is obtained, but if, on the other hand, the company, from an abundance of caution, desires to have the commission's approval in its corporate organization and issuance of stock, why does it not apply to the commission for a preliminary order authorizing it to complete its corporate organization but withholding the final certificate until the company shall have obtained a license or permit from the City of Chicago and the park commissions?

The chief difference between Section 55 of the Illinois Act and the provisions of the New York and California Acts is that the Illinois Act, while patterned after the other two, is in broader and more general terms and may be said, by its general provisions, to comprehend all or nearly all that is specially set forth in detail in the other laws from which it was modeled.

To pursue the course indicated in Mr. Lyon's letter would be to reverse the natural order of procedure and to deprive the city and the park municipalities from exercising their first right of control over streets and boulevards and further deprive the commission of the benefit of the findings or determinations of these local municipalities when it comes to determine the questions with which it is especially charged. Furthermore, it is important to the city at this time, before the constitutionality of the Act has been passed upon, to insist that the regular and natural order of procedure be followed in order that none of its rights of control over streets may be prejudiced.

In conclusion, I am of the opinion that the company can complete its corporate organization and issue its stock without

the issuance of the certificate of public convenience and necessity; that if any order or permission is necessary on the part of the commission for the completion of corporate organization that such an order would be in the nature of a preliminary order; that the company should obtain a license or permit first from the city and the park commissions and afterwards procure, as the final act, the certificate of public convenience and necessity from the State Commission.

Respectfully submitted,

JAMES G. SKINNER,
Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,
Corporation Counsel.

OCTOBER 29, 1914.

In re ARCHITECTS CERTIFICATE ON BUILDING PLANS.

Hon. Francis D. Connery,
City Clerk.

Dear Sir:

We have your communication of October 23, 1914, requesting us to advise the committee on buildings and city hall, whether the City of Chicago has power to enforce the provisions of section 238 of the Chicago Code of 1911, requiring architects to accompany all plans submitted to the building department for approval with a certificate to the effect that said plans comply with all the structural requirements of the ordinances:

Said section 238 is as follows:

“Architect must certify that plans comply with the building ordinances.) It shall be unlawful for any architect, or other person permitted under the laws of the state to make plans, to prepare or submit to the commissioner of buildings for his approval any final plans for any building or structure which do not comply with the structural requirements of this chapter. It shall be the duty of the commissioner of buildings to require that all plans submitted to him for approval for any building or structure shall be accompanied by a certificate of such architect or such other person preparing such plans that the plans submitted comply with the structural requirements of this chapter.”

While we believe that the commissioner of buildings may require that all plans submitted to him for approval shall be accompanied by a certificate of the architect as indicated, it is extremely doubtful if such architect can be prosecuted for preparing or submitting to the commissioner of buildings for his approval, any final plans which do not comply with the structural requirements of the ordinances.

The first sentence in the section above quoted, which makes such an act unlawful, it seems to us, regulates the occupation of architects, rather than the construction of buildings. It purports to impose upon the architect, the duty of determining in each case, whether his building plans comply with the structural requirements of the ordinances. This trust is in another part of the ordinance, placed in the building commissioner.

It often happens, that a provision in the building ordinances may receive more than one construction and, indeed, on many occasions, this department has great difficulty in determining what was the intention of the city council in making certain requirements.

We believe that the courts will hesitate to impose a penalty upon architects who place their own, perhaps honest, construction upon the building ordinances of the City of Chicago, and prepare or submit plans for the approval of the building commissioner, even though it be determined that such plans do not comply with the structural requirements of the ordinances.

Respectfully submitted,

JOSEPH F. GROSSMAN,

Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,

Corporation Counsel.

OCTOBER 30, 1914.

In re LIABILITY OF CITY FOR INCREASED EXPENSE TO A RAILROAD
COMPANY IN EXECUTING WORK REQUIRED BY A TRACK
ELEVATION ORDINANCE, SAID INCREASED EXPENSE
BEING OCCASIONED BY THE CITY'S ACTS.

HON. JOHN A. RICHERT, Chairman, Committee on Finance.

Dear Sir :

We return herewith papers in the claim of the Baltimore & Ohio Railroad Company, which you transmitted with the request that the committee be advised as to the liability of the city.

From the information available, it seems that about the time the B. & O. Railroad Company were elevating their tracks the City of Chicago found it necessary to install a 24-inch water main in South Chicago avenue, from Harbor avenue to 95th street, there being no water main in that portion of the street. The railroad company had parts of the street torn up and when the City installed the water main the street became impassible and it was found that the surplus material could not be conveniently separated and removed by the City.

When the railroad company reached the point of grading, they were forced to remove the material excavated below sub-grade by the Water Pipe Extension Department.

It appears from our investigation, the B. & O. Railroad Company complied with all provision of the track elevation ordinance that legally could be expected of them, and nothing is contained therein exempting the City of Chicago for any extra work that might be found necessary during the elevation of the company's tracks.

Therefore, we are inclined to believe that, by reason of the City's neglect and failure in removing the surplus material there was placed upon the railroad company an additional burden and expense.

If a municipal corporation, by its own act, causes the work to be done to be more expensive than it otherwise would have been according to the terms of the contract, it is liable for the increased cost of the extra work. This is subject to the qualification contained in the ordinances requiring written order and action on the part of the city council.

Messinger v. City of Buffalo, 21 N. Y. 196.

Mulholland v. Mayor of New York, 113 N. Y. 631.

City of Chicago v. Duffy, 117 Ill. App. 261.

On the other hand, where the person is not doing contract work for the City and the City causes additional expense by such an act, the claim stands on the footing of an implied contract. Such a contract, according to the strict letter of the law, could not be recognized, since it is a well established rule that if there is a statute or ordinance prescribing the method by which an officer or agent can bind a municipal corporation by contract such method must be followed, and there can be no implied contract or liability unless this is done.

Roemheld v. City of Chicago, 231 Ill. 467.

In the present instance, however, the equities are so clearly on the side of the claimant that it would be entirely proper for your committee to determine the matter on its merits without invoking the technical point which could be raised as indicated above, and it cannot be said that the city council would be going beyond its authority if the claim was allowed. In view of these facts our recommendation is that such amount as you find is fair and reasonable for this work ought to be allowed the company.

As we are not in a position to pass upon the correctness of the amount, we would further recommend that the matter be referred to the commissioner of public works for his approval as to the sum to be allowed.

Very truly yours,

J. EDWARD CLANCY,
Assistant Corporation Counsel.

Approved:

BRYAN Y. CRAIG,
Acting Corporation Counsel.

OCTOBER 30, 1914.

In re CREATION OF ART COMMISSION.

Hon. Carter H. Harrison,
Mayor.

Dear Sir:

We are in receipt of your communication of the 28th

inst., requesting that an ordinance be drawn creating a Chicago Art Commission. On April 24, 1899, an Act of the Legislature was approved, entitled "An Act to provide for the creation of art commissions in cities and to define their powers." This Act is still in force. It provides that whenever in any city the city council shall deem it advisable, they may, by ordinance provide for the creation of a commission to be known as the Art Commission of such city. The Act further provides who shall constitute the commission, their terms of office, that they shall serve without compensation, their powers and that the expenses of the said commission shall be paid by appropriation made therefor by the common council annually. The Act provides, among other things, that,

"hereafter no work of art shall become the property of such city by purchase, gift or otherwise, unless such work of art or a design of the same, together with a statement of the proposed location of such work of art, shall first have been submitted it and approved by the commission."

It appears from Chapter VII of The Chicago Code of 1911 that an Art Commission of the city of Chicago has been created pursuant to the provisions of said Act of the General Assembly. Inasmuch as the subject of the creation of Art Commissions for cities and their powers, etc., has been legislated upon by the General Assembly, it is doubtful whether the city council could lawfully create a commission of the general character of the Art Commission provided for in the statute unless it should follow and be governed by the provisions of the said Act of the Legislature, including the personnel of the members of the commission. It is possible that the city council may, independent of the said Act of the Legislature, create a commission bearing some other title than that of the Art Commission of the City of Chicago and having powers analogous to those of the Art Commission contemplated in the statute.

We have drafted and send you herewith two ordinances, one of which amends said Chapter VII of The Chicago Code of 1911. It incorporates the present Chapter VII and adds thereto provisions for the purchase of works of art of Chicago artists as outlined in your communication. The other

ordinance repeals Chapter VII of The Chicago Code of 1911 and creates a commission to be known as the Commission for The Encouragement of Local Art with the personnel indicated in your communication of the 28th inst. and with power to purchase works of art of Chicago artists. We have assumed that you did not desire an appropriation to be made for this object before the next annual appropriation bill.

Yours respectfully,

BRYAN Y. CRAIG,

First Assistant Corporation Counsel.

OCTOBER 31, 1914.

In re CHARGE OF COST OF REPLACING TRACKS BY REASON OF
CHANGED LOCATION OF SEWERS, ETC.

Barrow, Wade, Guthrie & Company,

Monadnock Block,

Chicago, Illinois.

Gentlemen :

In compliance with your request for an opinion as to the right of the Chicago City Railway Company to charge the cost of renewal and replacement of tracks occasioned by the laying of sewers and water mains or the fixing of street grade or paving, or other street improvement, to either capital or renewals, we beg to advise you that in considering this question a sharp line should be drawn between the work done by that company under the ordinance of February 11, 1907, and that done by virtue of the fact that it is operating the lines contemplated and authorized by the ordinance of March 30, 1908.

Under the 1907 ordinance the company is not permitted to charge renewals and replacement of tracks occasioned by the laying of sewers, water mains, or the fixing of street grade or paving, or other street improvement, to capital under any circumstances, but might charge such cost to either renewals or operating expense, depending upon the particular circumstances of the individual case.

Quite a different rule prevails, however, as to work of the nature under consideration performed on the lines covered by the ordinance of March 30, 1908. Section 2 of said ordinance is, in part, as follows :

“In case the Company shall be required to construct or reconstruct any portion of its tracks, equipment or roadbed in any street, before any sewer and any water supply pipes shall have been constructed and laid therein, or in any such part thereof, as is or shall be occupied by the tracks of the Company, or before the street grade in any such street or streets shall have been established, or before the paving thereof, where now unpaved, shall have been provided for, and afterwards the Company shall be required to take up, move or change its tracks and equipment in any such street or streets by reason of the construction of such sewer or water mains, or the fixing of the street grade or the paving of such street or streets, or shall be required to further reconstruct or re-equip its tracks, equipment, roadbed or pavement therein, then, in any such event, the cost and expense thereby caused and incurred, except such part thereof as the Board of Supervising Engineers shall determine to be properly charged to operating expenses, maintenance repairs or renewals, shall be charged to capital account, as provided in Section six (6) hereof, and not to maintenance, repairs or renewals.”

Section 6 of the ordinance of March 30, 1908, provides, in part:

“After the expiration of such ‘Period of Rehabilitation,’ the cost of renewals shall be paid as provided in **Section 14** hereof, but such expenditures (and only such expenditures) as are made for the purpose of extensions of or additions to property, shall be thereafter considered **as additions to capital**, provided, however, that in the replacement of any principal part of the property, either existing or hereafter acquired, there shall be charged to capital the excess amount that the new property cost over the original cost of the property displaced, excepting that the value of property contained in the appraisal inventory of the property of the Company, referred to in subdivision No. 1 of Section 18 hereof, shall be used instead of first cost for all property listed in such appraisal inventory; and provided, further, that where no sewer and water supply pipes shall have been constructed and laid in the streets or the parts thereof occupied by the tracks of the Company, or in the streets or parts thereof included in the extensions provided for in ‘Exhibit B,’ and where the city has not established the street grade in such streets or such parts thereof, or where the city has not by proper ordinance provided for the pavement of such streets or parts thereof, the Company shall, except as

hereinbefore provided, be required to construct, reconstruct, equip or re-equip its tracks, roadbed and overhead construction, or any part thereof in such portions of said streets only to the extent and in the manner which the Board of Supervising Engineers shall require, until the above mentioned improvements in said streets shall have been made or provided for by the city as aforesaid; and when the city shall make and provide for said improvements in said streets as aforesaid, then the Company shall, subject to the terms and provisions of this ordinance, proceed to construct, reconstruct, equip and re-equip such portions of its tracks, roadbed, overhead equipment and pavement, as shall be located upon said streets, and such construction, reconstruction, equipment or re-equipment, or any part thereof, when made, shall be in all respects in compliance with the provisions of 'Exhibit B,' and the cost thereof, shall be charged as provided in Sections two (2) and six (6) hereof."

From that portion of Section 2 to which reference has been made, it will be seen that if the company is required to do any construction work in any street before any sewer and water supply pipes shall have been constructed in such street, or in any part thereof, occupied by the tracks of the company, or before the street grade in any street has been established, or such street is paved where at the date of the passage of said ordinance it was unpaved, and thereafter the company shall be required to take up, move or change its tracks or equipment in any such street by reason of the construction of such sewer or water mains or fixing of the grade or paving of the street, or shall be required to further reconstruct or re-equip its tracks, etc., then, and in such event, the cost incurred in so doing, except such part thereof as the Board of Supervising Engineers shall determine to be properly charged to operating expense, maintenance, repairs or renewals, shall be charged to capital. It will, therefore, be observed that the fixing of the manner in which, or the account to which such expenditures shall be charged is left to the determination of the Board of Supervising Engineers. And the determination of the board in that regard would probably be held to be conclusive in the absence of fraud. It would probably be the intention that section 2 should apply only to the rehabilitation period. As will be noted, section 6 provides that, under

the circumstances enumerated in that portion of section 2 to which we have made reference, the company shall not, after the period of rehabilitation, be required to do any construction, reconstruction, equipment or re-equipment work on its tracks, roadbed and overhead construction, except in the discretion of the Board of Supervising Engineers, and then in the manner designated by the board. This provision again leaves it to the discretion of the board as to whether or not work of the character mentioned shall be done before street grades are established, pavement placed on streets or sewer and water pipes placed therein, but in case the company does such work before the street improvements just referred to are placed in a street, the limitations contained in section 2, to which reference has been made, do not apply.

Yours very truly,

CHARLES M. HAFT,
Assistant Corporation Counsel.

Approved:

BRYAN Y. CRAIG,
Acting Corporation Counsel.

NOVEMBER 2, 1914.

In re BAIL BONDS.

Hon James Gleason,

General Superintendent of Police.

Dear Sir:

We have in hand your communication of October 14, 1914, in which you ask whether or not the department of police can legally refuse to accept Joseph O'Donnell, Dennis P. Foley, Abe Kaplan and Tony May as bondsmen.

The authority to pass upon bail bonds is given the chief of police or any captain, lieutenant or sergeant in the department in quasi-criminal cases by the Municipal Court Act, (Chap. 37, Sec. 313, Par. 50, Hurd's Revised Statutes 1909). The exercise of this power is subject to regulation by the rules of the Municipal Court and is applied during those hours in which the court is not in session.

The right to bail is a constitutional right. The Constitution of this State (Art. II, Sec. 7) provides that:

"All persons shall be bailable by a sufficient surety,

except for capital offenses, where the proof is evident or the presumption great * * *.”

The interpretation placed on this section is, we think, well stated in *Lewis v. The People*, 18 Ill. App. 76, in which it is said:

“The right to be bailed being constitutional is independent of courts and officers.”

In *Waugh v. The People*, 17 Ill. 575, commenting on the departure of a sheriff from the strict letter of the statute, the court said:

“The sheriff was bound to pursue his authority strictly, and when he departed from it he acted without authority and the recognizance was void as if he had no authority whatever to require bail.”

It is our opinion, therefore, that where a good and sufficient bond is offered by a prisoner the same cannot be refused, but the statute and the rules of The Municipal Court afford protection to the City against fraud and imposition, and it is the duty of any member of your department exercising this power to use every proper and reasonable precaution before accepting bail. The careful application of these rules will, we think, enable your department to avoid worthless bail bonds.

The report, which was forwarded to the mayor, on Joseph O'Donnell stated that there were several forfeited bonds against him at that time.

The rules of the court provide that no bond shall be taken from a person charged with a misdemeanor by members of your department “unless the value of the real estate scheduled and offered by the person proposing to become surety shall be worth double the amount of the bond required after deducting from the fair value of the property offered all incumbrances on said property, the value of the homestead, dower rights and all other indebtedness of the surety.” (See rule 27.)

Rule 28 provides that members of your department shall not accept any surety or take any bond unless they are satisfied from the questions and answers required “that the person so offering himself as surety is financially responsible,

and that a judgment on a forfeiture in case the bond be forfeited can be collected.

The fact that O'Donnell has not paid the bonds forfeited against him is sufficient, in our opinion, to warrant a refusal of him as bondsman.

Dennis P. Foley is reported not to have scheduled property. It is clear, therefore, that he has not qualified as bail and can be refused until such time as he shall schedule.

The report on Abe Kaplan states that he schedules 2318 Blue Island avenue, which has a value of \$5,500, and is encumbered for \$3,450. It is therefore apparent if Kaplan goes bail to the extent of \$1,000, with that property he has exhausted it for the purposes of bail.

Tony May does not qualify as bail according to our report. It states he schedules 1408 Wells street, valued at \$4,000, and encumbered for the same amount. May signed fifteen notes of \$100, each payable monthly beginning October, 1913, but inasmuch as he had no equity in this property when he purchased it, we are of the opinion that this security is doubtful and should not be accepted.

Yours very truly,

VERNON L. BEAN,
Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,
Corporation Counsel.

NOVEMBER 2, 1914.

In re STATUS OF SURF STREET.

HON JOHN E. TRAEGER, *Comptroller.*

Dear Sir:

In 1858 the Town Board of the Village of Lake View condemned a roadway for a public street, now known as Surf street. It runs east and west from Broadway out to the lake.

In 1869 the property south of Surf street was subdivided into town lots and called "LeMoynes Subdivision." The surveyor, in making that plat, disregarded the survey made by the town board in 1858 by making the north side of the

subdivision extend over the street 5.28 feet, which according to LeMoyne's Subdivision, leaves the street but 61 feet wide.

The property owners on the north side of the street have for a long time questioned the right of the property owners to take possession of the said 5.28 feet. The property owners on the south side are willing to take it, but the property owners on the north are protesting against it. There is a suit now pending entitled *Remy v. City of Chicago*, which will soon be in the Supreme Court of the State of Illinois for final adjudication, and which will decide the right of the abutting owners to occupy this 5.28 feet.

The survey and proceeding pertaining to the opening of said street in 1858 were never recorded in the Recorder's Office of Cook County, consequently the Recorder's map shows this street according to LeMoyne's Subdivision and only leaves the street 61 feet wide. The city map department discovering this mistake several years ago, changed its atlas so that that department now shows the street to be 66 feet wide with the 5.28 feet belonging to the street.

The attached document duly certified by the City Clerk of the City of Chicago is an extract from Volume 2 of the Record of the Town of Lake View now in the custody of the City Clerk.

The Torrens' attorneys are passing the titles under their system according to the LeMoyne subdivision and they will continue to do so unless there is something of record showing that the LeMoyne survey is wrong. For this reason we respectfully ask that you have the attached document recorded so that there will not be any more ground for further litigation over this street.

Respectfully submitted,

A. L. GETTYS,

Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,

Corporation Counsel.

NOVEMBER 3, 1914.

In re RIGHT OF OFFICIAL TO SERVE CITY IN TWO POSITIONS.

HON. JOHN E. TRAEGER, City Comptroller.

Dear Sir:

On April 14, 1914, this department rendered an opinion addressed to you wherein we held that there was nothing in the statutes or ordinances of the city to prevent city officers or employes from performing additional duties as members of the board of examiners of mason contractors, and from drawing additional pay appropriated by the city council as salaries for the members of said board.

On October 23, 1914, this department rendered an opinion addressed to the civil service commission, holding that John Campbell could not occupy the position and receive the pay of a building inspector as well as that of a member of the board of examiners of mason contractors.

The question has arisen in your department whether, in view of the most recent opinion upon the subject, you are authorized to pay the salaries of the building commissioner and the city architect as members of the board of examiners.

There is no inconsistency between the two opinions. As a general proposition there is nothing in the statutes or city ordinances which prevents an officer or employe of the city from drawing a salary from two different sources. No person can, however, hold two *incompatible* offices as indicated in our advice to the civil service commission. The duties of a member of the board of examiners of mason contractors, in our opinion, are not incompatible with the duties of either the building commissioner, city architect or building inspector. It so happens, however, that in the case of John Campbell the provision in the ordinance that every employe of the department of buildings shall devote his entire time to such employment and shall not be engaged in any other position or occupation, makes his position or office incompatible with every other office in the city's service.

In the case of the building commissioner, the statute authorizing the creation of the board of examiners of mason contractors expressly provides that he shall be *ex officio* a member of that board, and hence the offices last mentioned

cannot be incompatible. In the case of the city architect there is no such provision as is found in the building code, and hence there is nothing which prevents the city architect from holding the position of a member of the board of examiners, unless the duties of the two positions are such that they conflict. Our investigation indicates that this is not the fact.

Respectfully submitted,
LEON HORNSTEIN,
JOSEPH F. GROSSMAN,
Assistant Corporation Counsel.

Approved:
JOHN W. BECKWITH,
Corporation Counsel.

NOVEMBER 4, 1914.

In re GAMBLING.
Hon. James S. McInerney,
Prosecuting Attorney.

Dear Sir:

We acknowledge receipt of your communication of October 17, 1914, in which you request an opinion as to whether or not the disposal of Barodis diamonds, as described in the circular and letter accompanying your communication, amount to a violation of the gaming laws of this State and City.

The letter describes the Barodis diamond receipt holder as being made of wood containing six hundred holes; each hole is covered on both sides with paper, also that each hole contains a five cent Barodis diamond receipt for which the customer pays five cents, or a free merchandise trading stamp for which the customer does not pay. Some of these so-called stamps give the purchaser a credit on his purchase of 5, 10, 25 or 50 cents. The receipts and trading stamps when they amount to \$1.00 are good for one Barodis diamond stick-pin. According to the circular, the purchaser of the last receipt receives a premium. The circular and letter also recites that every purchaser helps a good cause along, as ten per cent. of the gross receipts of each week is sent to the Little Sisters of the Poor.

The powers of the City of Chicago relative to the control and suppression of gambling is derived from Clause 45, Sec-

tion 1, Article V, Chapter 24 R. S. of Illinois of 1911, and is in part as follows:

“To suppress gaming, gambling houses, lotteries, and all fraudulent devices and practices for the purpose of gaining or obtaining money or property.”

The statute forbidding lotteries is as follows:

“SETTING UP OF.) §180. Whoever sets up or promotes any lottery for money or by way of lottery disposes of any property of value, real or personal, or under pretense of a sale, gift or delivery of any other property, or any right, privilege or thing whatever, disposes of, or offers or attempts to dispose of any real or personal property with intent to make the disposal of such real or personal property dependent upon or connected with any chance by dice, lot, numbers, game, hazard or other gambling device, whereby such chance or device is made an additional inducement to the disposal or sale of said property, and whoever aids, either by printing or writing, or is in any way concerned in the setting up, managing or drawing of any such lottery, or in such disposal, or offer or attempt to dispose of property by any such chance or device, shall, for each offense, be fined not exceeding \$2,000.” Chapter 38, Hurd’s Rev. Stat. (Criminal Code).

The validity of this statute has been repeatedly upheld in our Supreme Court as will be seen by reference to the case of *Dunne v. The People*, 40 Ill. 465, wherein on page 467, the court held that a lottery is “a scheme for the distribution of prizes by chance.”

And in the case of *Thomas v. The People*, 59 Ill. 160, the court, on page 164, in commenting upon a scheme of certain tickets, condemned the same as a lottery in the following language:

“Even if the ticket to the concerts and lectures, and an engraving, were intrinsically worth \$5, the scheme would still be a lottery. The hand bill advertisement delivered with each ticket held out inducements to purchase. * * *

“Had not this plan been watched by the vigilance of the law, can there be any doubt that numerous persons would have purchased tickets, prompted by the hope of gain? Are there not inseparably connected with it the same fascination and excitement and intense desire for gain, which gather around the gaming table?

“Like any other species of gambling, lotteries have a pernicious influence upon the character of all engaged in them.”

Section 985 of The Chicago Code of 1911, in reference to Lotteries and Policy Games, is in part as follows:

“No person shall sell, offer for sale, vend, barter, exchange, give away, deal in or in any way dispose of or redeem any ticket, order slip or device of any kind for or representing any number of shares or any interest in any lottery, policy or scheme of chance of any kind or description by whatever name, style or title the same may be denominated or known, and whether located or to be drawn, paid or carried on within or without the limits of the City of Chicago, or whether such purported drawings be real or imaginary.”

Horner v. United States, 147 U. S. Rep. 449, is one of the leading cases in the country on lotteries. The facts in that case were predicated upon the disposal in the State of New York of Austrian Government Bonds. The circular describing the bonds (P. 456) substantially was that during the first year the Austrian Government agrees to pay, as the minimum amount for any bond redeemed, 135 gulden; the second year, 140 gulden, increasing annually 5 gulden until redeemed at 200 gulden. Under the plan other and larger amounts are to be paid on certain of the bonds, to be determined by the drawings. The court on page 458, defines a lottery as follows:

“In law the term ‘lottery’ embraces all schemes for the disposition of prizes by chance, such as policy-playing, gift-exhibitions, prize-concerts, raffles at fairs, etc., and includes various forms of gambling.”

The court further states:

“Whoever purchases one of the bonds, purchases a chance in a lottery, or, within the language of the statute, an ‘enterprise offering prizes dependent upon lot or chance.’ The element of certainty goes hand in hand with the element of lot or chance, and the former does not destroy the existence or effect of the latter. What is called in the statute a ‘so-called gift concert’ has in it an element of certainty and also an element of chance; and the transaction embodied in the bond in question is a ‘similar enterprise’ to lotteries and gift concerts.”

On page 460, the court makes the following statement:

“The mere reading of one of these bonds and the

drawing plant annexed to it, which is put in evidence, shows that it was the intention to stimulate the sale of the bonds by these large prizes, which were to be determined at every drawing, and which every holder of a bond had the chance of obtaining; and hence it seems to me that the purpose of the scheme was not only to determine by lot when the bonds should be paid, but also to determine certain extraordinary chances to the holders of the fortunate numbers drawn."

The decision is replete with authorities, citing with approval *Thomas v. The People*, 59 Ill. 160 and *Dunne v. The People*, 40 Ill. 465.

The court quotes, on page 462, with approval the following language from the case of *Ballock v. State*, 73 Md. 1:

" 'It cannot be said this is not a species of gambling, and that it does not tend in any degree to promote a gambling spirit and a love of making gain through the chance of dice, cards, wheel or other method of settling a contingency. It certainly cannot be said that it is not 'in the nature of a lottery,' and that it has no tendency to create desire for other and more pernicious modes of gaming. Our statute does not justify a court, expressly directed to so construe the law as to prevent every possible evasion, whether designedly or accidentally adopted, in deciding a thing is not a lottery, simply because there can be no loss, when there may be very large contingent gains, or because it lacks some element of a lottery according to some particular dictionary's definition of one, when it has all the other elements, with all the pernicious tendencies, which the State is seeking to prevent.' "

On page 463 the court cites with approval the case of *Commonwealth v. The Sheriff*, 10 Phila. Rep. 203:

" * * * where it was said that whatever amounted to the distribution of prizes by chance was a lottery, no matter how ingeniously the object of it might be concealed."

The court finally denounced the above method of disposing of the Austrian Government Bonds in the United States as a lottery.

The case of *Hume v. City of Ft. Smith*, 93 Fed. Rep. 857, involved an Arkansas statute which licensed gift enterprises and defined the same as including the premium stamp, periodi-

cal ticket, trading stamp, and similar schemes and devices by means of which certain merchants, manufacturers and other persons engaged in lawful callings are advertised, exploited, and patronized to the exclusion of others on like terms.

In this case the Fourteenth amendment to the United States Constitution was invoked to protect the stamp dealers from the payment of license fees and the court at page 863 quoted the following from the decision in *Live Stock, Etc., Assn. v. Crescent City, etc., Co.*, 1 Abb. (U. S. 398) :

“ ‘We may safely say that it is one of the privileges of every American citizen to adopt and follow such lawful industrial pursuits, not injurious to the community, as he may see fit, without unreasonable regulation or molestation.’ ”

“It would thus appear that the Supreme Court of the United States excepts from the operation of the fourteenth amendment pursuits ‘injurious to the community.’ It recognizes the principle that such occupations or pursuits as fall within the police powers of the states are not affected by the fourteenth amendment. *Mugler v. Kansas*, 123 U. S. 623, 8 Sup. Ct. 273. Manifestly, the legislature of the state regarded this gift enterprise business as detrimental to the community. I do myself. I do not regard it as a legitimate business. The legislature might have prohibited it altogether, in the exercise of its police power; but it chose to license it, and make it a source of revenue to the city, as it does some other deleterious occupations, with which, in my opinion, the gift enterprise business should be classed. If right in this, the act of the City Council, being clearly within the act of the legislature, is valid and binding, and neither the one nor the other infringes, I think, the provisions of the fourteenth amendment to the constitution of the United States.”

In reference to the point that a person may draw one of the so-called Barodis free trading stamps for which he pays nothing, we wish to state that the same might be true of persons shaking dice for something of value and the highest number shaken in the dice entitles the successful party to win or participate in the result for which he pays nothing, but there is an implied agreement that if he is unsuccessful in shaking a high number he will be compelled to pay for the

same. Certainly it could not be claimed that this is not gaming.

Another feature in this matter (Barodis) which may have an important effect in holding it to be a gaming device or a lottery would be the value of the stick pin. If it is of little value in proportion to the price paid for it, it would have a material effect in denouncing the scheme as a lottery or gaming.

A gambling device is defined to be anything which is used as a means of playing for money or other thing of value, so that the result depends more largely on chance than skill.

Therefore, in view of the law as above stated, we are of the opinion that the above described scheme for disposal of the Barodis diamonds is a violation of both the statutes and city ordinances on lotteries and of the same forbidding the possession of gaming devices.

We herewith return to your office the circular and the letter, free stamp and other coupon.

Very truly yours,

M. W. CAGNEY,

Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,
Corporation Counsel.

NOVEMBER 4, 1914.

In re CHARGE OF COST OF PAVING ABANDONED RIGHT OF WAY
OF THE C. & S. T. Co.

BARROW, WADE, GUTHRIE & COMPANY,
Monadnock Block,
Chicago, Illinois.

Gentlemen:

In compliance with your request that you be advised as to whether or not the bill of Calumet Coal & Teaming Company of December 30, 1911, for \$2,697.30 for paving the abandoned right of way of the C. & S. T. Co. on Vincennes road between 80th and 81st streets, and whether payment made to the Chicago City Railway Company for expenses incidental to the acquisition of the property of the Chicago

& Southern Traction Company are properly chargeable to capital account, we beg to advise you that inasmuch as Section 1 of the ordinance of January 29, 1912 (printed Journal of the Council Proceedings, page 2688), expressly limits the amount which may be charged to capital to \$600,000, and, inasmuch as that sum has been expended independently of the items in question, there is no authority that sanctions the charging of the items in question to capital account.

Yours truly,

CHARLES M. HAFT,

Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,

Corporation Counsel.

NOVEMBER 5, 1914.

In re STREET RAILWAY ACCOUNTING.

Barrow, Wade, Guthrie & Company,

Monadnock Block,

Chicago, Illinois.

Gentlemen:

In reply to your inquiry of October 27, 1914, as to the account to which there should be charged any operating expenses, exclusive of renewals, which exceed 70 per cent. of the gross receipts during the rehabilitation period, we are of the opinion that all operating expenses should be paid out of the gross receipts before any of the gross receipts—whether 30 per cent. or less—would be applicable to renewals.

While the foregoing, in our opinion, is clearly the proper method of setting up the accounts, it might well be that it would make no difference whether or not the excess of operating expenses, to which you refer, should be charged to renewals if the renewal fund was not sufficiently large to pay the entire cost of renewals. To illustrate: On a basis of \$10,000,000. Under the ordinance \$7,000,000 would be set aside out of the gross to defray operating expenses, including maintenance and repairs. The remaining \$3,000,000 would be set aside to pay for renewals. If, however, the operating expenses should be \$8,000,000, and the expenditures on account of renewals should be \$4,000,000, there would be but \$2,000,000 in the renewal fund, which would necessitate charging \$2,-

000,000 of renewals to capital; whereas, if the operating expenses had been but \$7,000,000, but \$1,000,000 expended on renewals would have been chargeable to capital. It is, therefore, seen that while the excess operating expense to which you refer is payable primarily out of what would otherwise be set aside for renewals, it results that the excess expenditure for operating expenses eventually comes out of capital, because whenever there is a deficiency of the renewal fund the amount of the deficiency is paid out of capital. Of course there is no charge to capital so long as the renewal fund is not exhausted.

We are of the opinion that the rehabilitation period should be treated as an entirety instead of each year being treated as a period by itself.

Yours truly,

CHARLES M. HAFT,
Assistant Corporation Counsel.

Approved:

BRYAN Y. CRAIG,
Acting Corporation Counsel.

NOVEMBER 6, 1914.

In re WAGE LOAN SOCIETY.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

We have your communication of October 29th, to which is attached a letter of the First State Industrial Wage Loan Society, dated October 28th, requesting an opinion as to whether said Society can be exempted from the general order issued by you and the Civil Service Commission jointly relating to the assignment of wages by city employees.

The purport of the order is to advise all employees in the city's service that charges will be preferred against any one who shall assign his wages, either earned or unearned, to any person and the removal and discharge of said employe will follow any such act, in accordance with the rules of the Civil Service Commission.

The First State Industrial Wage Loan Society is a corporation organized for pecunairy profit under a recent act.

of the legislature. Under said act the corporation is permitted to loan money and hold as security for the payment of same an assignment of wages of the borrower, and may charge and collect not to exceed 3 per cent. per month as interest for the use of said money. The earnings of the company are limited to 6 per cent. upon its capital, which must be at least \$50,000.00.

Whatever the motives were or are of the persons who were responsible for the passage of the incorporation act and the organization of this Society, it must be treated in its relation to the government authorities in the same manner as any other corporation for pecuniary profit.

We have carefully considered the facts which led to the issuance of the order or notice regarding assignment of wages, and we believe that whatever legal efficacy the order referred to may have will be endangered if not destroyed by exempting from its operation such wage loan societies as are organized in the manner in which the First State Industrial Wage Loan Society is incorporated, or by exempting any other person from the operation of said order.

Respectfully submitted,

JOSEPH F. GROSSMAN,
Assistant Corporation Counsel.

Approved:

BRYAN Y. CRAIG,
Acting Corporation Counsel.

NOVEMBER 7, 1914.

In re ELECTRICAL INSPECTIONS IN STATE BUILDINGS.

HON. RAY PALMER, Commissioner of Gas and Electricity.

Dear Sir:

We have your communication of the 27th ult., addressed to the corporation counsel, asking to be informed "if this (electrical) department has authority to make electrical inspections and enforce the requirements of the ordinance in— (a) buildings or property owned and occupied by the State of Illinois—(b) buildings or premises owned by private concerns and leased to and occupied by State Departments, within the City of Chicago."

Section 26, Article IV of the Constitution is as follows:

“The State of Illinois shall never be made defendant in any court of law or equity.”

Construing this section of the Constitution, our Supreme Court has said:

“In this section of the constitution the fiat of the people, the supreme authority of the State, is so positive and clear that it requires only to be read to produce upon the mind the conviction that the inhibition therein contained is absolute and must be observed by the courts.”

The People of the State of Illinois v. The Sanitary District of Chicago, 210 Ill. 171, at page 173.

See

In re City of Mt. Vernon, 147 Ill. 363, at page 365.

“The State is a sovereign and cannot be sued by her citizens in her own courts without her permission.”

In *Fagan et al. v. City of Chicago*, 84 Ill. 227, at page 234, it is said that:

“A Municipal Corporation has no power to assess or exact from the State or general government any sum for benefits conferred.”

The authority conferred by the city ordinances can be exercised only on the governed and not the governing power—the State.

The ordinance in question, therefore, cannot be enforced in buildings or property owned and occupied by the State of Illinois, nor as against the State in buildings or premises leased to and occupied by State Departments within the City of Chicago.

It may be expected, however, that the State will observe the laws and reasonable regulations of its political divisions, such as Municipal Corporations, and we therefore beg leave to suggest that you notify those in charge of buildings owned by the State and premises leased and occupied by State Departments in the City of Chicago of the provisions of the ordinance and they doubtless will comply with the same.

Yours very truly,

GEORGE B. O'REILLY,

Assistant Corporation Counsel.

Approved:

BRYAN Y. CRAIG,

Acting Corporation Counsel.

NOVEMBER 9, 1914.

In re WATER TUNNELS UNDER SOUTH SHORE COUNTRY CLUB
PROPERTY.

HON. JOHN E. TRAEGER, Comptroller.

Dear Sir:

In answer to your communication of the 29th ult., with reference to the right of the city to maintain certain water tunnels under the property of the South Shore County Club under the provisions of an ordinance passed May 14, 1906 (C. J. 410), I wish to say that investigation discloses the fact that permission and authority to maintain tunnels No. 3 and 4 were granted by an instrument in writing, upon payment by the City of Chicago to the owner of an annual rental of \$135.00. Non-compliance with the conditions of said instrument which granted an easement to the city, was to operate as a forfeiture of the authority thus granted.

It appears that since July 1, 1906 no rental has been paid.

The original instrument creating said easement is on file in the office of the City Clerk, but has never been recorded. A copy of the same is on file in the office of the Department of Public Works.

The ordinance in question, while not containing any rental provisions, does reserve to the city the right to maintain its water tunnels in the subdivision vacated.

However, that may be, the only condition annexed to the vacation of certain streets by said ordinance, was the dedication of certain other streets by the owners within sixty (60) days after the passage of the ordinance. This condition has been fulfilled.

Since it appears that the instrument in writing creating the easement preceded the passage of said ordinance, that clause of the ordinance which provides the reservation, manifestly has reference to the terms of the instrument as to annual rental.

No formal notice has been served upon the city to remove or abandon said tunnels. Under the circumstances I would advise that all back payments be forthwith tendered to the owner or owners.

All papers are herewith returned.

Very truly yours,

NICHOLAS MICHELS,
Assistant Corporation Counsel.

Approved:

BRYAN Y. CRAIG,
Acting Corporation Counsel.

NOVEMBER 10, 1914.

In re RESPONSIBILITY FOR CITY CABLE REMOVED FROM TUNNEL
OF CHICAGO TUNNEL COMPANY.

HON. RAY PALMER, Commissioner of Gas and Electricity.

Dear Sir:

Your letter of the 10th ult., and supplemental letter of the 7th inst., requesting an opinion as to the responsibility of the Chicago Tunnel Company for the loss of unused cables, were received and in reply we beg to state the following:

The city business agent's order No. 23015, Requisition No. 46158, dated July 17th, 1914, provided for "removing and hauling to Chicago Tunnel No. 2 at Dearborn and South Water streets, and hoisting same to the surface, cables as per appended list, which are at the present time located in tunnels of the Chicago Tunnel Company."

Certain cables described by location, material, number of lineal feet and pounds were specified in the order. It appears that the company proceeded to execute the order and that subsequently the city checked up the cables removed by the company and found that the cable located in Randolph street from 1456 feet west of Fifth avenue to Canal street and the cable in Canal street from Randolph street to Washington street, both of which were in the list of cables to be removed, were missing. The officials of the company disclaimed any knowledge as to when or by whom the two cables last mentioned were removed.

It appears that the order which was given to the company listed the missing cables and recited that such cables were at the time when the order was given located in the tunnels, and that the company proceeded to and did execute the order and never claimed that any of the listed cables were not found

in the tunnels until the shortage was called to the company's attention by the city after the check was made by the city.

These circumstances would make slight proof by the city as to the presence in the tunnels of the missing cables at the time when the company executed the contract sufficient to cast upon the company the burden of proof as to this fact.

If the cables which are missing were in fact removed by the company from the tunnels, then it was the company's duty to exercise ordinary care for the safekeeping of the cables until they should be delivered to the city, or until the city should be notified that the cables had been removed, and to assume charge thereof, and if the cables were lost after they were removed by the company and before the city had taken charge thereof or been notified so to do, then proof by the city of loss of the cables would establish a sufficient *prima facie* case against the company to put it upon its defense and require it to show that the cables were not lost through lack of ordinary care on the company's part.

Yours very truly,

S. A. T. WATKINS,

Assistant Corporation Counsel.

Approved:

BRYAN Y. CRAIG,

Acting Corporation Counsel.

NOVEMBER 11, 1914.

In re RIGHT OF POLICE OFFICERS TO MAKE ARRESTS OF AUTOMOBILE OWNERS WHO VIOLATE THE ORDINANCE PROHIBITING OBSTRUCTION OF LOOP STREETS BY AUTOMOBILES.

HON. EUGENE BLOCK, Chairman, Committee on Local Transportation.

Dear Sir:

In your letter of October 15, 1914, you ask this department to advise you whether summons is required or whether summary arrest may not be made of all offenders who permit automobiles to remain in the loop district unattended for a period of time longer than that permitted under the ordinances.

Captain Healy of the mounted police complains that the system of starting suits to collect penalties in The Municipal Court has proven unsatisfactory. He states that there are thousands of prosecutions piled up and that such long delays have ensued that the success of prosecutions has become almost impossible for the reason that the parties on both sides have forgotten the details of the cases. Captain Healy is of the opinion that much of this trouble could be avoided if the officers were permitted to arrest the offenders on view.

With regard to the right of police officers to make arrests on view, we call your attention to Section 49 of "An Act in relation to a Municipal Court in the City of Chicago." (Hurd's Revised Statutes of 1913, page 742.) The fourth clause of said Section 49 provides, in part, as follows:

"Fourth. Any police officer of the City of Chicago may arrest on view any person who may be seen by such police officer in the act of violating, within the City of Chicago, any ordinance of said city, or any ordinance of any municipal corporation situated, in whole or in part, within the limits of said city, whenever such violation is, by such ordinance, made punishable by fine or otherwise. * * *"

Under the provisions of the statute just quoted, it would seem that a police officer has the right to make arrests of offenders who violate the ordinance in permitting automobiles to stand unattended for a period longer than that prescribed in such ordinance, when such violation is seen by such police officer.

The making of arrests for trifling violations has proven unpopular and arrangements have been made by the chief justice of The Municipal Court to save persons violating ordinances from the humiliation and annoyance occasioned by such arrests.

In the Speeders' Court, an arrangement has been instituted whereby the officer who has seen a violation of the automobile ordinance hands the offenders a slip similar to the one herewith transmitted. The slip is a notification to such offenders to appear in the particular court designated therein the following morning. Before the case is called the following day, the officer prepares a complaint which is on file when the

case is called. The cases are called the following morning and the defendants submit to the jurisdiction of the court. Our information is that only in rare instances do the defendants fail to appear.

The only arrests made for violation of the automobile ordinances are in cases of speeding, and even in most of these cases the offenders are not arrested but notified to appear the next morning. When the officer is not sure that the offender will make his appearance the following morning, the offender is taken to the police station, booked and permitted to go on his own recognizance. Where an offender has been notified to appear in the Speeders' Court the following morning and fails to appear, the court then issues a warrant and the defendant is arrested and brought into court on such warrant.

The system of serving notice by a police officer upon the persons who permit their automobiles to remain on the streets unattended for a period longer than the time prescribed in the ordinance will expedite matters materially, and we recommend that such system be adopted. The system meets with the approval of the office of the chief justice of The Municipal Court.

Respectfully submitted,

MAX M. KORSHAK,
Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,
Corporation Counsel.

NOVEMBER 11, 1914.

In re CONSTRUCTION OF STATUTE THAT MUNICIPALITIES MAY GRANT CONSENT TO THE LAYING OF TRACKS "ON THE PETITION OF THE COMPANY."

HON. EUGENE BLOCK, Chairman, Committee on Local Transportation.

Dear Sir:

In your letter of October 29, 1914, addressed to the corporation counsel, you ask to be advised as to the construction of the statute which provides that the corporate authorities of

any city may grant consent to the laying of tracks by any street railway company "on the petition of the company."

It appears that your committee has before it the petition of the Chicago Railways Company for rights in Waveland avenue from Broadway to Halsted. Your committee has also a similar petition from the Chicago City Railway Company asking rights in Ashland avenue from 75th to 79th streets. The petitions recite that public advertisement has been made in pursuance to the statute relating thereto. Both of these matters, it appears, have been before the committee in another form; on August 24th there were referred to the committee by the City Council verification reports on frontage consent petitions for these lines, and the committee recommended to the City Council that ordinances be granted to the companies for rights in these streets.

The report of the local transportation committee to the City Council recommending the ordinances for passage antedates the presenting of the petition by the traction companies. The question has been raised that it might be construed that the ordinances were passed upon the recommendation of the local transportation committee, and not "on the petition of the company" as required by statute.

Section 3, Chapter 131a (entitled, "Street Railroads"), contained in Hurd's Revised Statutes of 1913, page 2413, provides as follows:

"3. LOCATION OF ROAD—CONSENT—NOTICE—DAMAGES.) §3. No such company shall have the right to locate or construct its road upon or along any street or alley, or over any public ground in any incorporated city, town or village, without the consent of the corporate authorities of such city, town or village, nor upon or along any road or highway, or upon any public ground without any incorporated city, town or village, except upon the consent of the county board. Such consent may be granted for any period, not longer than twenty years, *on the petition of the company*, upon such terms and conditions, not inconsistent with the provisions of this act, as such corporate authorities or county board, as the case may be, shall deem for the best interests of the public: *Provided*, no such consent shall be granted unless at least ten days' public notice of the time

and place of presenting such petition shall have first been given by publication in some newspaper published in the city or county where such road is to be constructed, and except upon the condition that the company will pay all damages to owners of property abutting upon the street, alley, road, highway or public ground upon or over which such road is to be constructed, which they may sustain by reason of the location or construction of the road; the same to be ascertained and paid in the manner provided by law for the exercise of the right of eminent domain."

We are of the opinion that the statute contemplates that no grant shall be made unless there is at the time of the passage of the ordinance a petition of the street railway company requesting such grant. If at the time an ordinance is passed granting track rights to a street railway corporation a petition requesting that such grant be made is on file, the statute is complied with. The fact that the City has referred the matter to a committee for a report and that such report antedates the presenting of the petition to the City Council cannot affect the situation. Assuming that both the recommendation of the transportation committee and the petition of the company is on file at the time that an ordinance is passed, it is impossible to tell whether the ordinance was passed on the recommendation of the committee or on the petition of the traction company. It is possible in such cases that the Council has disregarded the recommendation of the transportation committee and passed the ordinance on the petition of the company. The Council grants consent to the street railway company when it passes the ordinance, and the statute is complied with if at the time of such passage there is on file the petition of the company required by statute.

Answering your questions specifically, we have to say:

(1) The ordinances for the Waveland avenue and Ashland avenue extensions need not be withdrawn and a substitute reported on the company's petition. As a matter of fact, as to these particular extensions, the petition of the company in the regular order of Council proceedings appears first and the recommendation of the local transportation committee, that the ordinances be passed, follows:

(2) There is no legal requirement that the committee report on ordinances follow the company's petition.

(3) The consent of the City, granted by the passage of the ordinance, must follow the presentment of a petition by the company. Such petition must be before the Council *prior* to the time that the ordinance is passed.

Very truly yours,

MAX M. KORSHAK,
Assistant Corporation Counsel.

Approved:

BRYAN Y. CRAIG,
Acting Corporation Counsel.

NOVEMBER 11, 1914.

In re STREET RAILWAY EXTENSIONS FOR 1914.

HON. EUGENE BLOCK, Chairman, Committee on Local Transportation.

Dear Sir:

In your letter dated October 15, 1914, addressed to us, you state that on June 29, 1914, your committee recommended to the Council for passage ordinances providing for construction by the traction companies of the 1914 *quota* of extensions. The companies did not advertise their "public notice," required by the statute, until September 22, 1914, and the ordinances were not passed until after said "public notice" was given.

You further state that the ordinances require completion by December 31, 1914 and that the companies contend that it is impossible to build these extensions by that time. The companies have asked the committee to change the ordinances to provide for the construction during 1915 and that the extensions named in said ordinances be considered as 1915 extensions. You further state that it is the contention of the companies that because the lines must be built in 1915 they must be considered extensions for 1915. There is also an implication on the part of the companies that because certain extensions of the Chicago Railways Company which were ordered in 1913 were authorized to be constructed in 1914, the construction of such extensions in 1914 constituted such exten-

sions a part of the extensions which the City was entitled to during the calendar year 1914, and that the City is not entitled to any further extensions for the year 1913, notwithstanding the full *quota* to which the City was entitled was not constructed in 1913.

You ask us to advise you whether the City may in this year designate its *quota* of extensions to be constructed as this year's extensions but set the date of completion in next year and by so doing place a valid obligation upon the company to construct such extensions; and also whether the designation of a date in next year for completion of the extensions ordered this year automatically operates to place such extensions into the category of next year's extensions and thereby further operates to deprive the City next year of the right to require construction during that year of that year's specified mileage of compulsory extensions.

Section 3 of the ordinance of the Chicago Railways Company, passed February 11, 1907, provides as follows:

“* * * at any time after three (3) years from the acceptance of this ordinance, the Company shall upon the order of the City Council of the City, construct and equip such additional extensions as may be required by the City and shall operate the same as a part of its system in conformity with the provisions of this ordinance, provided, that the Company shall not be obligated hereby to construct and operate any such additional extensions in any street or public way nearer any then existing parallel street railway tracks of the Company than one-half mile, and that the Company shall not be obligated hereby to construct more than six miles of double track railway or twelve miles of single track railway in any one calendar year during the term of this grant.”

Section 3 of the ordinance of the Chicago City Railway Company, dated February 11, 1907, provides as follows:

“* * * at any time after three (3) years from the acceptance of this ordinance, the Company shall upon the order of the City Council of the City, construct and equip such additional extensions as may be required by the City and shall operate the same as a part of its system in conformity with the provisions of this ordinance; provided, that the Company shall not be obligated hereby to construct and operate any such additional extensions in any

street or public way nearer any *then* existing parallel street railway tracks of the Company than one-half mile, and that the Company shall not be obligated hereby to construct more than four miles of double track railway or eight miles of single track railway in any one calendar year during the term of this grant."

Under the above ordinances, the City has a right to exact such extensions as it shall deem necessary. The only limitation on the amount that the City may exact is six miles of double track railway or twelve miles of single track railway, in the case of the Chicago Railways Company, and four miles of double track railway or eight miles of single track railway in the case of the Chicago City Railway Company "*in any one calendar year.*"

If a year passes and the City has failed to demand its *quota* for that particular year, then the City cannot during the following year exact the extension for the particular year in addition to the *quota* that the City is entitled to for such following year. The ordinance is plain that "the Company shall not be obligated hereby to construct more than * * * miles of double track railway or * * * miles of single track railway in any one calendar year during the term of this grant." The City can only compel the companies to construct the amount of mileage which they are obligated to construct under the ordinances and no more. To illustrate:— Under the ordinance of the Chicago Railways Company, the City can exact six miles of double track railway for a calendar year. Suppose the City during the year 1915 fails to exact said *quota* of six miles of double track railway, and in January, 1916 the Chicago Railways Company is ordered by the City to construct six miles of double track railway and complete the construction of said six miles of double track railway before the end of the calendar year. In such case, the company cannot then be compelled to construct during said calendar year 1916 the six miles which the City has failed to obligate the said Chicago Railways Company to construct during the calendar year 1915.

This is the situation only where a calendar year passes and the City has during that year failed to obligate the traction companies to construct the *quota* which the City has a

right to demand under the 1907 ordinances. Where, however, the City has by order obligated the traction companies to construct during any given calendar year the *quota* which the City has a right to demand under the 1907 ordinances, and the companies through no fault of the City fail to construct such extensions during such calendar year, then, in such event, the construction by the companies during the following year of the full *quota* to which the City was entitled for such following year does not release the companies from the obligation to construct the *quota* demanded by the City for the previous year.

Answering your inquiry specifically, if the City this year (1914) designates its *quota* of extensions to be constructed as this year's extensions and sets the date for completion some time during next year, then such portion of such extensions as should be constructed during next year would be credited upon the trackage which the City is entitled to require the company to construct during 1915. If during the year 1915 the company should construct extensions up to the limit of the *quota* provided for under the ordinances for the year 1915, it could not be required to do any more.

We recommend, therefore, that in the future the list of compulsory extensions should be decided upon and ordered constructed as early as practicable in the calendar year. Should the companies desire to construct such extensions during the following year, the City should grant no extension except upon the condition that the ordinance providing for the particular extension contain a provision that the construction of such extension during such following year shall not operate to release the traction companies from the full *quota* which the City is authorized to exact for such following year under the section of the 1907 ordinances relating to compulsory extensions.

This should be done with reference to the ordinances recommended for passage by your committee on June 29, 1914. These ordinances provide that the extensions therein named shall be completed by December 31, 1914, which the companies contend is now impossible. Your committee should not recommend the extension of the time of completion of these exten-

sions into the year 1915 unless the ordinances granting further time for the completion of the extensions specifically provide that the completion of such extensions in the year 1915 shall not operate to discharge the companies from their obligation to construct (in addition to the extensions required by the ordinances recommended June 29, 1914), the full *quoto* of compulsory extensions which the City is authorized to exact under the compulsory extension provisions of Sections 3 of the ordinances of February 11, 1907 to the Chicago Railways Company and to the Chicago City Railway Company, respectively, for the calendar year 1915.

You also ask to be advised as to the power to exact extensions from the companies in addition to the mileage which the City is entitled to under the sections relating to compulsory extensions where the additional mileage does not operate to reduce the companies' return to an unreasonable extent; and who would be the authority short of the courts to pass upon the question whether such construction would so reduce the returns.

The provision you have in mind is contained in Section 3 of the ordinance of the Chicago City Railway Company, passed February 11, 1907. The same provision is also contained in the ordinance of the Chicago Railways Company, passed February 11, 1907. The provision reads as follows:

"The Company shall, however, upon the order of the City Council of the City, construct, equip and operate such extensions of its street railway system in addition to those hereinabove provided for as may be required by the City Council subject to the conditions and limitations contained in Section 25 of this ordinance."

Section 25, above referred to, of the same ordinance, provides as follows:

"SECTION 25. The Company shall not be required on account of any extensions of subways or on account of underground trolleys, or on account of any extensions of its street railways, other than the extensions provided for in Exhibit A, and in Section 36 of this ordinance, and four (4) miles of double or eight (8) miles of single track per annum, as in Section 3 hereof provided, to increase its total capital investment to such an extent that the return thereon over and above the interest charge of five

per cent. thereon by this ordinance authorized, would be reduced to an inadequate or unreasonably small amount.”

Under the above provisions just quoted, there is no limit to the amount of extensions which may be demanded by the City provided that the cost of such extensions do not increase the total capital investment to such an extent that the returns thereon for and above the interest charge of five per cent. would be reduced to an inadequate or unreasonably small amount.

The City Council is the tribunal which determines whether or not the cost of the extensions operates to reduce the companies' return to an unreasonable extent. Under the above provision, however, the determination of the City Council is subject to judicial review.

Very truly yours.

MAX M. KORSHAK,
Assistant Corporation Counsel.

Approved:

BRYAN Y. CRAIG,
Acting Corporation Counsel.

NOVEMBER 12, 1914.

In re COURTS FOR TENEMENT BUILDINGS.

HON. HENRY ERICSSON, Commissioner of Buildings.

Dear Sir:

We acknowledge receipt of your communication of November 5th, 1914, relative to the question as to whether or not a three foot court is necessary in a new three story tenement building along its side when there exists a vacant space of 7 feet along the east side on the adjoining property owner's lot.

We also note the contents of the agreement between Bessie Raskin, owner of Lot 4, and Vincent Gangel, whom we are informed was the former owner of Lot 3, by which agreement the owner of Lot 4 agreed that there shall be a perpetual easement on the west 7 feet of said Lot 4, which said 7 feet shall be left vacant and be used for no other purpose except for passage for which easement the owner of Lot 3 paid a consideration of \$250.00. Lots 3 and 4 face north on

Division street west of Hoyne avenue; Lot 4 is immediately west of Lot 3. The question now arises as to whether the owner of Lot 3 can build a permanent improvement $1\frac{1}{2}$ feet from the west line on his lot with windows on the west wall without leaving a court. The above referred to agreement has been recorded in the recorder's office of Cook County.

Section 448 of The Chicago Code of 1911 requires that habitable rooms, bath rooms, pantries, etc., shall have at least one window and a minimum width of one foot opening upon a street, alley, yard, court or vent-shaft.

A "building court" is defined by Webster's Unabridged Dictionary as "an enclosed space; a court yard; an uncovered area shut in by walls of a building or by different buildings; also a space opening upon a street nearly surrounded by houses. A blind alley."

Paragraph (d) of Section 432 of The Chicago Code of 1911, defines a court as follows:

"(d) 'Court' is an open, unoccupied, unobstructed space, other than a yard, on the same lot with a tenement house; a court entirely surrounded by a tenement house is an 'inner court'; a court bounded on one side and both ends by a tenement house, and on the remaining side by a lot line is a 'lot line court'; a court extending to a street, alley or yard is an 'outer court.' "

Section 442 of The Chicago Code of 1911 as amended March 20, 1911, see Journal of Council Proceedings, page 4252, provides in part as follows:

"(f) In case of a three-story tenement on a lot twenty-five feet or less in width, a continuous lot line passage open to the sky, and at least three feet wide, shall be accepted in lieu of a lot line court or outer court hereinabove specified in Paragraph (a) * * *"

According to the above Paragraph (f) of Section 442, a space of three feet would be necessary to the west of the building on Lot 3, unless your department can take cognizance of the easement as set forth in the agreement by and between the property owners, and by recognizing the force of the agreement declared to be a compliance with the ordinance.

In the case of *Strauss v. Putts*, No. 9227, in the Supreme

Court of Illinois, decided February 7, 1914, and the opinion filed October 16, 1914, the Supreme Court therein decided:

That where an owner sold one-half of a building lot with a perpetual easement that the purchaser should keep three feet free of improvements, and afterwards various other lots including the other half of this particular lot were improved with a substantial theatre building with emergency exits on the three feet referred to, and the same was subsequently obstructed by the owner in violation of the easement, the effect of providing such a passage way was a compliance with the ordinances of Chicago requiring exits in theatres. These ordinances provided that the complainant must have exits in the west wall of said building unobstructed (on the three feet), so that they may be used in emergencies. The court held that the parties to the easement agreement were presumed to know the law and the ordinances of the City of Chicago bearing on the construction of such buildings, and that under those ordinances, theatre buildings must be provided with emergency exits, * * * and the court accordingly recognized the full force and effect of the three foot easement, and considered the same in connection with the enforcement of the ordinances.

Therefore, in view of the law above stated, we are of the opinion that you are empowered under the law to recognize the (seven foot) easement in question, and to consider that the space between the buildings has 8½ feet, and, therefore, to be a full compliance as to court space, under paragraph (f) of Section 442 as above quoted.

We wish, however, to call your attention to the fact that should the owners of the above lots seek to evade the provisions of the building ordinances by hereafter setting aside by mutual arrangement the above referred seven foot easement agreement, then in that case, your department can enforce the provisions of paragraph (e) of Section 435 of The Chicago Code of 1911 which is as follows:

“(e) If a new tenement house is occupied as a place of habitation in any of its parts in violation of this section, it shall forthwith be subject to notice from the Commissioner of Buildings and shall be vacated upon

such notice and shall not again be occupied until made to conform with the provisions of the Chapter nor until after the issuance of the two certificates required in this section."

We are returning herewith a copy of the easement agreement, the blue print survey of Lot 4; also survey of Lot 3; also copy of opinion, *Straus v. Putts*.

Yours truly,

M. W. CAGNEY,

Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,

Corporation Counsel.

NOVEMBER 16, 1914.

In re ADDITIONS TO CAPITAL ACCOUNT BY STREET RAILWAY COMPANIES OF 10 PER CENT. UPON AMOUNT CONTRIBUTED FOR PAYMENT OF BOARD OF SUPERVISING ENGINEERS.

BARROW, WADE, GUTHRIE & COMPANY, Monadnock Block, Chicago, Illinois.

Gentlemen:

Replying to your letter of November 6, 1914, relative to the addition during the rehabilitation period to capital account of 10 per cent. upon the amounts contributed by the Chicago City Railway Company toward the expenses of the Board of Supervising Engineers, we advise you that the subject which you desire to have us consider is covered primarily by Section 34 of the ordinance of February 11, 1907, and that the part of said section which pertains to our present consideration is as follows:

"The salaries and expenses of said Board of Supervising Engineers during the period of 'Immediate Rehabilitation' provided for in this ordinance shall be added to and form a part of the cost of such 'Immediate Rehabilitation,' but thereafter shall be paid out of gross receipts as an operating expense."

This section specifies what may be added to and form a part of the *cost* of "Immediate Rehabilitation" and fixes that limitation at salaries and expenses of the board.

Section 7 of said ordinance provides, in part:

“The Company shall purchase materials and equipment, and employ engineers, superintendents, clerks, foremen and workmen and shall pay all expenses of every nature, including legal expenses necessary to the proper, complete and prompt performance of the above mentioned work upon the lowest advantageous terms and subject to the approval of the said Board of Supervising Engineers, and to the actual amount paid by the Company in and about carrying out each and all the requirements of *this section*, shall be added 10 per cent. of such amount as a fair and proper allowance to the Company for conducting the said work and furnishing the said equipment, etc.”

It will be observed that this section makes no provision whatever for the payment of the salaries and expenses of the board in the enumeration of the payments to be made by the company on account of rehabilitation work. Therefore, when that section provides that to the actual amount paid by the company in carrying out the requirements of that section shall be added 10 per cent. of “such amount,” it cannot be said that the term “such amount” refers to salaries and expenses of the board. Furthermore, the purpose of the allowance of 10 per cent on “such amount” is “as a fair and proper allowance to the company for conducting the said work and furnishing the said equipment.”

We venture to say that it will hardly be contended that there is anything in the language just quoted that would warrant a charge of 10 per cent. on the amount expended by the Board of Supervising Engineers for salaries and expenses.

We, therefore, advise you that it is our opinion that the Chicago City Railway Company is not permitted under the ordinance of February 11, 1907, to charge to capital account 10 per cent. upon amounts contributed by it during the rehabilitation period towards the salaries and expenses of the Board of Supervising Engineers.

Yours very truly,

CHARLES M. HAFT,
Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,
Corporation Counsel.

NOVEMBER 16, 1914.

In re RIGHT OF WAY OF THE ILLINOIS NORTHERN RAILWAY.
TO THE HONORABLE, THE CITY COUNCIL OF THE CITY OF CHICAGO.

Gentlemen:

Pursuant to the direction of your honorable body of October 5, 1914 (C. J. 1598), requesting this department to report by what authority the Illinois Northern Railway occupies the right-of-way along West Twenty-sixth street from South Rockwell to South Sacramento avenue, I beg leave to report as follows:

1. October 26th, 1874, the common council of the City of Chicago passed an ordinance granting permission and authority to the Chicago & Southern Railroad Company to lay a track from where the center line of Section 35, Township 39, Range 13, E., crosses the Illinois and Michigan Canal northerly to the north side of the Chicago River, thence northeasterly crossing the Bridewell grounds, in Section 25 at such point as the Bridewell commissioners may direct, thence easterly in Twenty-sixth street to intersection of Railroad street.

2. August 16, 1876 the City Council passed an ordinance under the terms of which said company "may also lay down tracks" on West Twenty-sixth street, from its intersection with Homan avenue, in an easterly direction, to the track of said company as at present located in said street.

3. December 19, 1892 the City Council passed an ordinance granting permission to the Atchison, Topeka and Santa Fe Railroad Company, as successor to the Chicago and Southern Railroad Company, which reads as follows:

"1. PREAMBLE—SPACE DEFINED.) WHEREAS, the Atchison, Topeka and Santa Fe Railroad Company, in Chicago, as successor to the Chicago and Southern Railroad Company, is owning and operating two railroad tracks in West Twenty-sixth street, from a point immediately east of Sacramento avenue to the east line of Western avenue, under and by virtue of the ordinance granting rights to the Chicago and Southern Railroad Company, adopted October 26, 1874, and the supplements thereto; and, whereas, it is desirable to define and set apart the particular portions of said West Twenty-sixth

street, which are to be used for sidewalks, driveway and railroad tracks, respectively; now, therefore.

Be it ordained by the City Council of the City of Chicago: §1. That, from the east line of Western avenue to the east line of Sacramento avenue, the sidewalk on the north side of said West Twenty-sixth street, be established at the width of fifteen feet; that the roadway be established at the width of thirty-eight feet, immediately south of and adjoining said north sidewalk; that the space to be occupied by the tracks of said railroad company be established at twenty-two and one-half feet, immediately south of and adjoining said roadway, and that the sidewalk space on the south side of Twenty-sixth street be established at a width of seven and one-half feet, immediately south of and adjoining the railroad strip aforesaid.

2. ALTERATION OF WALKS—CURBING—COST.) §2. That the changes in the location of the railroad track required by the provisions hereof, and the reduction of width of any existing sidewalk, and the replacing and resetting of curbing incident thereto, in accordance herewith, shall be made by and at the expense of said railroad company and under the supervision and direction of the commissioner of public works of the City of Chicago.

3. IMPROVEMENT OF STREET.) §3. Nothing herein contained shall be held to repeal any portion of said ordinance of October 26th, 1874, or the supplements thereto or the ordinances providing for the improvement of said street, or to release the said railroad company, or its successors, from any of the obligations thereby imposed.

4. REMAIN IN FORCE.) §4. This ordinance shall remain in force and effect from and after its passage."

4. September 3, 1907, the City Council passed an ordinance requiring the elevation of the tracks of the railroads therein named, including those of the Illinois Northern Railroad as the lessee of the Atchison, Topeka and Santa Fe Railroad Company.

This matter has received the attention of this department heretofore when it was sought to cause the removal of one or all of said tracks on West Twenty-sixth street along the Bridewell grounds.

Your honorable body may obtain further information on the subject through the department of public works.

Very truly yours,

NICHOLAS MICHELS,
Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,
Corporation Counsel.

NOVEMBER 17, 1914.

In re ACCOUNTING FEATURES OF STREET RAILWAY ORDINANCES.

MESSRS. M. & L. W. SCUDDER, Monadnock Block, Chicago, Illinois.

Gentlemen:

Replying to your letter of November 3, 1914, wherein you ask four questions, we beg to advise you as follows:

1. Section 2 of the Railways ordinance provides, in part:

“The company shall proceed at once to reconstruct portions of the track and roadbed constituting said system of street railways now maintained and operated by the receivers of the Chicago Union Traction Company,” etc.

Section 44 of the same ordinance provides, in part, that after the submission of the ordinance to a vote of the people and the result of said vote being in the affirmative,

“then and in that event, this ordinance shall take effect and be in force from and after the acceptance of this ordinance, in accordance with the conditions hereof, by the company,” etc.

Section 43 of the ordinance provides:

“If the company shall accept this ordinance within the time limited therein for the acceptance thereof, then the rights and obligations of the city and the company under this ordinance shall be the same as if this ordinance had been passed on February 1st, A. D. 1907 and had been accepted by the company on February 1st, A. D. 1907, and accounting shall be had as between the city and the company as of that date.”

The first paragraph of Exhibit B, which is referred to in Section 2 is as follows:

“Immediately upon the acceptance of this ordinance

by the company it shall proceed with all due diligence to repair and reconstruct its street railway system and equipment and to secure the necessary supply of electric power to comply with the provisions of this ordinance and under the following specifications:"

In connection with the foregoing, we assume the fact to be that the ordinance was accepted by the company on the 28th of January, A. D. 1908. Of course, we must consider in this connection that between February 11th, 1907 and January 28th, 1908, the time within which the company might accept was legally extended by the City Council.

Inasmuch as it is the apparent intention evidenced by the ordinance that there shall be a three-year period during which active actual reconstruction work shall take place, and inasmuch as Exhibit B is referred to in Section 2 as a part thereof for the purpose of making that section more specific, we regard the language of Exhibit B to the effect that "Immediately upon the acceptance of the ordinance the work of reconstruction shall begin" as controlling. Therefore, the period of rehabilitation will begin on the date of acceptance, or, as stated in your letter, January 28th, 1908. The rehabilitation period would end three years from the date of its beginning, or January 27, 1911.

2. Section 43, from which we have heretofore quoted, fixes February 1st, 1907, as the time when the ordinance becomes effective for the purposes of accounting. Under the terms of Section 7 of the ordinance, the residue representing the difference between the actual operating expenses and 70 per cent. of the gross receipts is required to be expended for renewals, and unless you mean the term "damages," used in your letter, to comprehend something falling within the category of operating expenses, such as personal injury claims, expenditures therefor would not be payable out of the 70 per cent. unless there was a surplus in the 70 per cent fund after paying operating expenses, in which case, if you mean the term "damages" to comprehend damages to plant and property of the company, necessitating the renewal thereof, then the residue representing the difference between the actual operating expenses and 70 per cent. of the gross receipts could be expended for damages defined as we have just suggested.

3. The addition of 15 per cent. "to the actual amount paid by the company" is allowed solely by virtue of the provisions of Section 7 of the ordinance, and it is allowed only on the work of "construction, reconstruction, equipment, re-equipment, extensions and additions to plant and property," etc., all of which is "subject to the approval of the said Board of Supervising Engineers," and we find no warrant in the ordinance for the addition of 15 per cent. "to the actual amount paid by the company" in performing work or furnishing material which is not performed or furnished "subject to the approval of the said Board of Supervising Engineers."

The Board of Supervising Engineers was the creation of the ordinance, and the board had no legal existence until the ordinance became an actuality, which was when it was accepted.

The ordinance (Section 20) fixes the T. V. C. valuation of the property of the company on the 30th of June, 1906, at \$29,000,000.00, but does not permit the addition thereto of either the 10 per cent. or the 5 per cent. referred to in Section 7, and in case of purchase there is to be added to the \$29,000,000.00 "the value of any and all property and equipment and additions thereto supplied, purchased or required by the receivers of the Chicago Union Traction Company as a part of said street railway system, including tunnel reconstruction between the 30th day of June, A. D. 1906 and February 1st, A. D. 1907, including any equipment and additions thereto which are in process on June 30th, 1906 * * *." But the ordinance does not allow in addition thereto either the 10 per cent. or the 5 per cent. provided for in Section 7 of said ordinance; also

"The cost of reconstruction and re-equipment of said street railway lines of the company and of the construction of new lines, extensions, underground trolleys, tunnel reconstruction, and other additions to property actually paid by said company at and prior to said purchase by said city and certified by the Board of Supervising Engineers, or incurred for work actually done or materials furnished with the approval of said board under completed or pending contracts," etc.

Clearly, this last enumeration does not cover property

which may have been acquired by the company or work done by the company without the supervision of the Board of Supervising Engineers between the 1st day of February, A. D. 1907 and the 28th day of January, A. D. 1908.

In view of the foregoing provisions of the ordinance in question we are forced to the conclusion that the addition of 15 per cent. to the actual amount paid by the company during the period from February 1st, 1907 to January 28, 1908 for construction, reconstruction, equipment, re-equipment and additions to plant and property is not permitted by the ordinance.

4. We are of the opinion that the ordinance of February 11, 1907, does not permit operating expenses in excess of 70 per cent. of the gross receipts to be charged to capital account during the period of "Immediate Rehabilitation."

Yours truly,

CHARLES M. HAFT,
Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,
Corporation Counsel.

NOVEMBER 17, 1914.

In re INTEREST ON CITY DEPOSITS.

HON. JOHN E. TRAEGER, City Comptroller.

Dear Sir:

In a letter of recent date, you stated that an order was introduced in the City Council directing the comptroller in advertising for bids for payment of interest on the City's deposits to ask for the interest rate for time deposits covering periods of thirty, sixty or ninety days.

Upon looking up the Council proceedings of November 9, 1914, we find that the action of the City Council took the form of an ordinance amending Section 25 of The Chicago Code of 1911. This ordinance will become effective upon receiving the Mayor's signature or upon the failure on the part of the Mayor to veto same, at the next meeting of the City Council.

The section as modified does not necessarily imply that

time deposits should be made, and, therefore, is not contrary to law.

On March 18, 1914, we had occasion to give an opinion to you with reference to the subject of time deposits. We stated in that opinion that depositing the City's funds in that way amounted to loaning out the money, and that it was beyond the power of the City's officers to do that. We suggested, however, that a scheme might be devised whereby bids may be taken on time deposits with the privilege of immediate withdrawal, and used the following language in relation thereto:

"It may be possible that additional interest can be secured through the means of an understanding or agreement to the effect that when moneys are left in the depositary for a period of ninety days or longer there shall be a higher rate of interest. There would be nothing contrary to law in making such an agreement. Bids could be invited on the basis of a difference in interest rates in case the money is allowed to remain in the depositary a certain length of time. If this will induce the banks to offer a higher rate to be paid only on condition that the money remains there for a long period and at a lower rate in case it is withdrawn sooner, it might be advisable to adopt that course, since it is entirely within the law."

It would seem from an examination of the amendatory ordinance that the City Council has undertaken to follow out this suggestion. The new ordinance simply requires you to ask for special bids for interest upon such money as shall be permitted to remain without diminution for periods of at least thirty, sixty or ninety days. We believe this can be lawfully done and there is nothing to hinder your observing the provisions of the ordinance as amended. We recommend in this connection that the advertisement to be so worded that there can be no mistake about the right of the City to withdraw its funds at any time if it sees fit, and that the retention of same by the bank is entirely optional on the part of the City at all times.

Very truly yours,
LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:
JOHN W. BECKWITH,
Corporation Counsel.

NOVEMBER 18, 1914.

In re THEATER TICKET SCALPING.

TO THE HONORABLE, THE CITY COUNCIL.

Gentlemen:

At the meeting of your honorable body, held November 9, 1914, an order was passed, which appeared on page 1991 of the Journal of the Proceedings of the City Council of that date, directing the Corporation Counsel to report to the City Council at its next meeting "what powers the City Council or the executive officials of the city have to do away with the practice of ticket speculation and to compel the proprietors of amusement places to sell on their premises, and at all other places, all seats at the regular advertised prices."

An act of the General Assembly of the State of Illinois entitled "An Act to prohibit the sale of tickets for more than the price printed thereon, for theaters, circuses and places of amusement, and declaring the same a misdemeanor and fixing the penalties thereof" was approved April 22, 1907.

Said Act prohibited the sale of a ticket by a manager of a theater without the requirement on its face that it should not be resold at an advance and prohibited the sale of a ticket at an advance and prohibited the keeping of a place for such sale.

The constitutionality of said Act was considered by the Supreme Court of Illinois in the case of *People v. Steele*, 231 Ill. 340, in its opinion, in which case the Supreme Court held that the theater business was a private business and that the legislature could legally interfere with such business only to the extent that the public health, safety, morals, comfort and general welfare might require, and that the said Act, approved April 22, 1907, to prevent speculating in theater tickets had no relation to the public health, safety, morals or welfare and was unconstitutional and void.

Prior to the rendition of the Supreme Court opinion in the Steele case, the City of Chicago had passed an ordinance prohibiting scalping of theater tickets. On the same day on which the opinion in the Steele case was handed down, the Supreme Court also rendered an opinion in the case of *City of Chicago v. Powers*, 231 Ill. 560, in which the city

asked to have reviewed certain judgments of The Municipal Court of Chicago in favor of defendants in prosecutions brought against them for the violation of the said ordinance of the City of Chicago in regard to the scalping of theater tickets.

The Supreme Court in this opinion stated that in the case of *People v. Steele, supra*, it had decided that the above mentioned act of the legislature, having the same purpose as the ordinances involved, was invalid because beyond the constitutional power of the legislature, and that under the decision in that case, the ordinances of the City of Chicago in question were invalid.

In view of the above mentioned Supreme Court decisions, we are of the opinion that any penal ordinance that the City Council might pass forbidding speculating in theater tickets or forbidding proprietors of amusement places to sell on their premises or elsewhere seats at other than the regular advertised prices, would be invalid and incapable of enforcement.

The City Council on June 3, 1912, passed two ordinances relating to speculating in tickets to places of amusement, one of which, known as Section 108a, amended Section 108 of the Chicago Code of 1911, and the other of which amended Section 2030 of said Code. These ordinances appear in the Journal of the Proceedings of the City Council of June 3, 1912, on pages 622 and 623.

Section 2030, as amended, prohibits persons from having tickets in their possession for the purpose of selling them, or offering the same for sale in front of or near any theater or other place of amusement, for the purpose of speculating in such tickets. This section relates to the obstruction of sidewalks, and we see no reason to doubt its validity.

Said Section 108a relates to amusement or entertainment licenses (including licenses for theatrical entertainments) and is as follows:

“Section 108a. Provided, that the license, if granted, is accepted by the licensee or licensees upon the express condition that he or they will neither give, grant nor permit to be given or granted to any person or persons any options upon seats or tickets in said theater, baseball park or other place of amusement, or sell to any person or

persons any such seats or tickets with the intent and for the purpose of speculating in such seats or tickets, or accept the return of unsold tickets, that he or they will not charge or permit to be charged, directly or indirectly, by any agent or person in his or their employ, for any ticket or tickets, any sum over and above the sum printed on the face of such ticket or tickets, and that all seats shall be sold and disposed of to the public applying therefor, at the box office of the theater, baseball park or other place of amusement, selling said tickets, and that the license granted hereunder shall be null and void and may be revoked by the Mayor upon the failure or refusal of the applicant to comply with any of the foregoing conditions."

The following provision is printed upon the face of each amusement license issued by the City of Chicago:

"This license is subject to all ordinances now in force, or which may hereafter be passed, concerning entertainments, and may be revoked by the Mayor at any time at his discretion."

A person accepting such a license is charged with knowledge of the provisions of said Section 108a, and by accepting the license assents to its terms and conditions and is bound thereby. Our Supreme Court has held that a person accepting a license containing a provision for its revocation assents to and is bound by such provision.

Schwuchow v. City of Chicago, 68 Ill. 444.

Launder v. City of Chicago, 111 Ill. 291-296.

Malkan v. City of Chicago, 217 Ill. 471-477.

We are, therefore, of the opinion that the failure or refusal of the licensee, to whom such an amusement license is issued, to comply with any of the conditions expressed in said Section 108a would warrant the revocation of the license.

In conclusion we are of the opinion that in passing the said ordinances, Section 108a and the amendment to Section 2030, the City Council has gone as far in the matter under consideration as it can legally go.

Yours respectfully,

BRYAN Y. CRAIG,

First Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,
Corporation Counsel.

NOVEMBER 18, 1914.

In re ACCOUNTING OF PAYMENTS MADE BY THE STREET RAIL-
WAY COMPANIES FOR POWER.

Barrow, Wade, Guthrie & Company,
Monadnock Block,
Chicago, Ill.

Gentlemen :

Replying to your letter of November 6th, wherein you desire to be advised if the street railway company could consider a portion of the cost of purchased power as maintenance of its street railway system and equipment or whether the amount charged to purchased power must be considered as an expenditure in addition to the 6 per cent. of gross receipts required to be expended for maintenance and repairs, we advise you that the answer to your question must be predicated upon a determination as to whether or not a portion of the expenditure for power purchased may be regarded as a part of maintenance. If it is properly a part of maintenance such item may be treated in the same manner as any other item of maintenance, but, as we have advised you, it is our opinion that under the 1907 ordinances no part of money expended for power purchased can be considered as belonging to the category of maintenance, but is chargeable only to operating expense.

In response to your verbal inquiry, we advise you that if an item has been charged to renewals that should have been charged to operating expense, in order to rectify the error the amount that had been charged to renewals should be charged to operating expense and the renewal fund credited with the amount charged to operating expense.

Yours truly,
CHARLES M. HAFT,
Assistant Corporation Counsel.

Approved :

JOHN W. BECKWITH,
Corporation Counsel.

NOVEMBER 18, 1914.

In re LIABILITY OF CITY FOR DAMAGE DONE TO ELECTRIC WIRES
IN REMOVING TREE IN REAR OF 4830 GRAND BOULE-
VARD.

Mr. Walter Wright,
Secretary, Special Park Commission.

Dear Sir :

We have your communication of the 12th inst., relative to damage done to electric wires of the Commonwealth Edison Company caused by removing a tree in the rear of 4830 Grand boulevard, together with a letter of W. C. Berry of the claim department of the Commonwealth Edison Company, regarding the matter, and a report of the City Forester, Mr. J. H. Prost, and requesting the corporation counsel for an opinion as to whether or not the City is liable for the damage.

It appears from the report that, on October 30, 1914, four large poplar trees were cut down in the alley in the rear of 4830 Grand boulevard; that in so doing one tree struck the wires of the Commonwealth Edison Company, breaking one and causing a slack of about twenty feet in two other wires; that there was plenty of room in the alley to fell the tree without hitting the wires.

The question here presented is whether or not the city, in the care and maintenance of its small parks, acts in a governmental or corporate capacity. Authorities on the subject are conflicting. In some jurisdictions, it is held that a city, in the care and maintenance of public parks for the benefit of the inhabitants, acts in a governmental or public capacity in the performance of a duty for the benefit of the public, and is not impliedly liable for the negligence of its officers or agents who are intrusted with the maintenance of the parks.

Dillon, *Municipal Corporations*, Fifth Edition, Section 1659.

This view obtains in the States of Massachusetts, Rhode Island, Washington and Kentucky.

In New York State, and some other jurisdictions, it is held that a municipal corporation, in maintaining a public park, is liable for its negligence and carelessness and for the

negligence and carelessness of officers and agents, which result to persons lawfully using the park.

Dillon, *Municipal Corporations*, Fifth Edition, Section 1659, p. 2892.

So far as we know, the precise question here involved has not been determined by the Supreme or Appellate Courts in this State.

In a late case, our Supreme Court has held that when a municipal corporation is acting within its authority, in a ministerial character, in the management of its property, it is liable for the negligent acts of its employes, although the work in which they are engaged will inure to the benefit of the municipality. On the other hand, when a municipality is exercising judicial, discretionary or legislative authority conferred by its charter, or is discharging a duty imposed solely for the benefit of the public, it incurs no liability for the negligence of its officers.

Johnston v. City of Chicago, 258 Ill. 494.

In that case, the court also said :

“So, also, a municipal corporation is not responsible for the negligent acts of its employes who are endeavoring to carry out the regulations of said municipality for the *public health* and for the care of the sick and destitute.”

Id., at page 499.

Our Supreme Court has also held that a city has power, under clauses 77 and 78 of Section 1 of Article 5 of the City and Village Act, to maintain a hospital, either as a charity or in the exercise of its police power, as a means to promote the general health and welfare, and in neither case is it liable, under the doctrine of *respondeat superior*, for the negligent acts of the employes connected with the hospital.

Tollefson v. City of Ottawa, 228 Ill. 134.

In Kentucky, its court places care and maintenance of parks as a governmental function on the ground of *public health*, saying :

“The right of the city to support public parks by taxation is rested upon the ground that the municipal authorities are charged with the duty of maintaining the

public health, and that parks where exercises and recreations can be indulged in, and pure and clean air breathed, contribute largely to the health of the community. Viewing this matter from this standpoint, the parks of the city occupy towards it and its inhabitants the same relation as do hospitals and other public institutions useful and necessary in the preservation of the health, safety and morals of the people."

Louisville Park Commissioners v. Prinz, 127 Ky. 460.

The Supreme Court of Illinois might similarly view the question.

The amount of the claim here considered is small, approximately \$25, but the principle involved is important, and the law, as we view it, so far doubtful, that, in the absence of a direct holding on the question by the Illinois courts, we are unable to say that the claim is one properly chargeable to the City.

We herewith return letter of Mr. Berry and the report of the matter accompanying your letter.

Yours very truly,

GEO. B. O'REILLY,

Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,

Corporation Counsel.

NOVEMBER 18, 1914.

In re PATRICK J. KEELEY FOR SALARY AS POLICEMAN NO. 1937.

HON. JOHN A. RICHERT, Chairman, Committee of Finance.

Dear Sir:

Your letter of October 28th, requesting information as to whether the opinion of this department at this date in the above mentioned matter agrees with the opinion of April 16, 1913, of this department, received.

In the case of *Hughes v. Traeger*, decided by the Supreme Court of this state October 16, 1914, the court held that a place of employment classified by the civil service commission is in the nature of an office.

An officer *de jure* is entitled to salary for the time he has been wrongfully kept from his office, providing, however, that

a *de facto* officer has not been paid his salary for such period of time.

As a result of the decision of *Hughes v. Traeger*, the courts may hold by analogy that an employe who has been legally appointed under civil service, being in the nature of an officer, is entitled to salary for the period during his wrongful suspension or discharge as an incident to his employment, providing salary has not been paid to the person performing the services of such employe.

The claim of Mr. Keeley is for salary for the periods of time covered by two suspensions pending an investigation of the same charges and for salary for the time between his discharge after the investigation of the charges by the civil service commission and his reinstatement upon a rehearing of the charges.

While we believe that the former opinion of this department is correct, and that if the applicant should bring suit on this claim he would fail to recover against a technical defense, yet the equities of the claimant's position may properly be considered by your committee in determining whether or not he should be paid.

We enclose herewith, petition, statements and correspondence concerning this claim.

Respectfully yours,

JOHN E. FOSTER,

Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,

Corporation Counsel.

NOVEMBER 19, 1914.

In re STREET RAILWAYS' ACCOUNTING DURING REHABILITATION
PERIOD.

Barrow, Wade, Guthrie & Company,
Monadnock Block,
Chicago, Illinois.

Gentlemen:

In reply to your letter of October 27, 1914, as to the account to which shall be charged any operating expenses, exclusive of renewals, which exceed 70 per cent. of the gross re-

ceipts, during the rehabilitation period, we beg to advise you that there are but two possible answers to your question. One of those is, the company's 45 per cent. of the net; the other is, the 30 per cent. of the gross receipts after deducting the 70 per cent. thereof.

Section 7 provides, in part, as follows:

“During the three (3) year period of ‘Immediate Rehabilitation’ seventy (70) per cent. of the gross receipts shall be set apart and shall be used so far as required in defraying the operating expenses, including maintenance and repairs, and the residue of said seventy (70) per cent. shall be applied to the cost of renewals and no part of the cost of any renewal paid for out of such seventy (70) per cent. shall be charged to additional capital, and all expenditures for renewals during said three (3) years in excess of such residue of said seventy (70) per cent. shall be charged to capital account.”

While the language above referred to—like much of that to be found in the ordinance—carries with it enough of the element of ambiguity to render it impossible to speak with absolute certainty as to the meaning thereof, we are bound to assume that it was intended to accomplish some purpose. And, the apparent purpose of the language in question is to limit the amount to be expended “in defraying the operating expenses, including maintenance and repairs,” to 70 per cent. of the gross receipts.

Limiting the operating expenses to 70 per cent. of the gross receipts without intending any result to follow expenditures for operating expenses exceeding the 70 per cent., would be purposeless.

The city surely had a good and sufficient motive in limiting the operating expenses to 70 per cent., as with such limitation enforced, it would be guaranteed something on account of its right to receive 55 per cent. of the net receipts, while, on the other hand, if it were permissible for the company to expend 100 per cent. of the gross for operating expenses, it would mean that the city would receive nothing whatever on account of its 55 per cent.

The provisions to which we have just referred clearly pertain only to the three-year period of “Immediate Rehabilitation,” and the company's guaranty—if such it may be con-

sidered—to limit operating expenses to 70 per cent. of the gross receipts could not be considered to extend beyond the period of “Immediate Rehabilitation.”

Section 24 of the Chicago City Railway Company ordinance is, in part, as follows:

“INTEREST RETURN ON CAPITAL INVESTMENT.

“SECTION 24. On or before the tenth day of April in each year the Company shall come to an accounting and settlement with the said City as of the thirty-first day of January last preceding, upon the following basis:

“From the gross receipts of the said street railway system and property from all sources and of every kind for the year ending on said thirty-first day of January there shall be deducted for such year:

“First: (1) All expenses of operation, including maintenance, repairs and renewals; (2) all amounts contributed during said year and then held in reserve under the provisions of Sections 16 and 18 hereof; (3) all amounts paid out for taxes and assessments levied and imposed upon the real and personal property of the Company, including all capital stock or franchise taxes levied or assessed after the 31st day of January, 1907, but not including any taxes which may by any court be ordered to be levied, assessed or collected after the 31st day of January, 1907, on account of the failure of the Company or any person, firm or corporation owning or having an interest in the said street railways or property, to pay any taxes which should have been paid for or on account of such street railways or property prior to the 31st day of January, 1907, and not including any sums paid by the Company to the City for city license fees, if any, exacted from the Company or its employees; (4) all salaries and expenses of the Board of Supervising Engineers by this ordinance authorized, after the period of ‘Immediate Rehabilitation;’ and

“Second: A sum equivalent to five (5) per centum per annum for said preceding year upon the amount of the cash purchase price which the said city would then be obligated to pay on account of the items specified in subdivisions 1, 2 and 3 of Section 20 hereof, if it were purchasing the property for municipal operation on such thirty-first day of January, interest being adjusted as to items added to such purchase price during said year. In case in any year the gross receipts shall not be sufficient to pay in full the items in the ‘first’ and ‘second’ paragraphs of this section mentioned, then the deficit shall be

paid out of the gross receipts of the subsequent year or years.

“DIVISION OF REMAINING NET RECEIPTS.

“After the deduction from the gross receipts of the items hereinbefore in this section provided, the amount remaining shall be considered as the net receipts for such year arising from the operation of the street railway system hereby authorized, and shall be divided between the Company and the said City in the following proportions: Forty-five (45) per cent. to be retained by the Company, and fifty-five (55) per cent. to be paid forthwith by the Company to the said City, crediting thereon all amounts paid out during the preceding year by the Company for City license fees, if any, exacted from the Company or its employees.”

We believe the correct construction to be that during the three-year period of “Immediate Rehabilitation” the expenditures for operating expenses in excess of 70 per cent. of the gross receipts should be charged to the company’s 45 per cent. of the net receipts.

There can be no question that after the period of “Immediate Rehabilitation” any operating expenses in excess of 70 per cent. of the gross receipts should be charged to the remaining 30 per cent. of the gross receipts.

Yours truly,

CHARLES M. HAFT,

Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,

Corporation Counsel.

NOVEMBER 19, 1914.

In re STREET RAILWAYS’ FRONTAGE CONSENTS.

HON. EUGENE BLOCK, Chairman, Committee on Local Transportation.

Dear Sir:

Replying to your request of October 29, 1914, for an opinion as to the necessity of frontage consents as a condition precedent to the right of the Chicago Railways Company to lay a track on State street from Madison street to Polk street, we beg to advise you that inasmuch as no consents were obtained prior to the passage of the ordinance of February 11, 1907,

that ordinance would be invalid so far as the grant to the company to lay tracks in State street between Polk street and Madison street is concerned, if frontage consents are essential, because they are a condition precedent to the passage of the ordinance under circumstances where they are required. This brings us, then, to the question, are frontage consents necessary under the circumstances involved.

Our answer to this question must be predicated upon the language employed in Section 655 of Chapter 24 of Hurd's Revised Statutes of 1911, known as the Mueller law, which is, in part, as follows:

“But no city shall proceed to operate street railways unless the proposition to operate shall first have been submitted to the electors of such city as a separate proposition and approved by three-fifths of those voting thereon. It shall be lawful for any such city to incorporate in any grant of the right to construct or operate street railways a reservation of the right on the part of such city to take over all or part of such street railways, at or before the expiration of such grant, upon such terms and conditions as may be provided in the grant; it shall also be lawful to provide in any such grant that in case such reserved right be not exercised by the city and it shall grant a right to another company to operate a street railway in the streets and parts of streets occupied by its grantee under the former grant the new grantee shall purchase and take over the street railway of the former grantee upon the terms that the city might have taken it over (and it shall be lawful for the city council of any city to make a grant containing such a reservation, for either the construction or operation or both the construction and operation of a street railway in, upon and along any of the streets or public ways therein, or portions thereof, in which street railway tracks are already located at the time of the making of such grant, without the petition or consent of any of the owners of the land abutting or fronting upon any street or public way, or portion thereof, covered by such grant.)”

The controlling language of this paragraph for the purposes of our present consideration is:

“and it shall be lawful for the city council of any city to make a grant containing such a reservation, for either the construction or operation or both the construction and operation of a street railway in, upon and along any of

the streets or public ways therein, or portions thereof, in which street railway tracks are already located at the time of the making of such grant, without the petition or consent of any of the owners of the land abutting or fronting upon any street or public way, or portion thereof, covered by such grant."

The first question for us to consider undoubtedly is, what effect, if any, did the passage of the Act of 1903 (from which we have just quoted a part of Section 1) have upon the ninetyeth paragraph of Section 62 of Chapter 24 of Hurd's Revised Statutes of 1911, which is as follows:

"Ninetieth. The city council or board of trustees shall have no power to grant the use of or the right to lay down any railroad tracks in any street of the city to any steam, dummy, electric, cable, horse or other railroad company, whether the same shall be incorporated under any general or special law of the State, now or hereafter in force, except upon the petition of the owners of the land representing more than one-half of the frontage of the street, or so much thereof as is sought to be used for railroad purposes, and when the street or part thereof sought to be used shall be more than one mile in extent, no petition of land owners shall be valid unless the same shall be signed by the owners of the land representing more than one-half of the frontage of each mile and of the fraction of a mile, if any in excess of the whole miles measuring from the initial point named in such petition, of such street or of the part thereof sought to be used for railroad purposes."

The Supreme Court in *Venner v. The Chicago City Railway Company*, 236 Ill. 349, seems to have saved us the necessity, at least so far as a grant to a company that already has tracks in the street is concerned, of forming our own conclusions on this question, as in that case, at page 362, the court says:

"It is also urged that the ordinance of February 11, 1907, is invalid by reason of the fact that the property owners of the land abutting upon the several lines of the Chicago City Railway Company's railroad in the streets of the city are not required to consent to the adoption of said ordinance or to the continuation of said railroads in said streets, as it is claimed is provided by clause 90 of Section 62 of the City and Village Act. The Act of 1903 provides that the city shall have the power to grant the

use of its streets for street railway purposes without the petition or consent of any of the owners of the land abutting or fronting upon any street or public way, or portion thereof, in which street railway tracks are already located at the time of making such grant. It is apparent, therefore, that the act of 1903, and not clause 90 of Section 62, controls in this case, and that the consent of the owners of property abutting upon the several lines of railroad of the Chicago City Railway Company laid in the streets of the city of Chicago was not necessary to the passage of said ordinance of February 11, 1907."

There may be some degree of merit in the contention that, aside from the literal meaning of the language employed in Section 1 of the Act of 1903, the Legislature intended that if a company had tracks in a street and the right to maintain them was not expiring, and if the council granted to a second company the right to lay a track in the same street and between the same points where the other tracks were, that as to such new tracks frontage consents should be obtained. It does not seem unreasonable that such might well have been the intention of the Legislature; nevertheless, we are required to determine the intention of the Legislature from the language to which we have just referred, and, if the Legislature did not in the words employed evince such an intention, it is our duty to say that none existed, however strongly we may be convinced outside of the language employed in the statute that there has been an oversight on the part of the Legislature.

By Section 3 of the ordinance of 1907 the city council seems to have treated the Act of 1903 as suspending the force of clause 90 of Section 62, aforesaid, as to streets where tracks were already laid, in that the concluding paragraph of Section 3 provides:

"The company shall not be authorized or obligated to construct any extension of its street railway system upon streets on which street railways are not located when this ordinance goes into effect until the city has granted to the company whatever authority, in addition to this ordinance, may be necessary to comply with the frontage consent laws of the State of Illinois."

In the absence of a statute requiring it, the city could

grant the right to lay street railway tracks in a street where no tracks were then in existence without requiring any frontage consents. On the other hand, in the absence of a statute on the subject, it is within the province of the city council to require frontage consents either as a condition precedent or subsequent to the grant of a right to lay street railway tracks in a street.

Byrne v. Chicago General Railway Company, 169 Ill. 75.

The council could, therefore, have required frontage consents as a condition to the laying of the tracks in State street, but it did not do so. On the contrary, it, by Section 3, impliedly provided that such consents need not be obtained.

It might be advisable to ascertain whether or not the court would consider the Act of 1903 as having the same effect upon clause 90 of Section 62, Chapter 24 of the Revised Statutes, irrespective of the question of a grant on the one hand of a right to continue the use of existing tracks, or a grant on the other hand of a right to construct additional tracks in a street where the tracks permitted by the former grant were to continue, and the grant in the second instance was to a grantee other than the grantee permitted to lay the tracks first allowed.

We beg also to call your attention to the former opinion of this department rendered to you May 28, 1912, wherein we had to deal with the specific street mentioned in the present communication and wherein we expressed our doubt as to the legal right of the railway company to lay this third track without additional frontage consents.

Inasmuch as the question of seeking the opinion of the courts as to the meaning of the Mueller law with the element of fact, which was not present in the Venner case, involved, is one of policy rather than of law, we do not deem it necessary to make any suggestions relative thereto.

Yours very truly,
CHARLES M. HAFT,
Assistant Corporation Counsel.

Approved:
JOHN W. BECKWITH,
Corporation Counsel.

November 20, 1914.

In re FRONTAGE CONSENTS ON RAVENSWOOD AVENUE.

Hon. Henry Ericsson,
Commissioner of Buildings.

Dear Sir:

In your letter of recent date you call attention to the fact that the City Counsel, by ordinance recently renamed the two streets formerly known as East Ravenswood Park and West Ravenswood Park, which extend along the east and west side of the right of way of the Chicago & Northwestern Railway Co., and gave to the two streets the name of Ravenswood Avenue.

This gives rise to the question whether, in granting permits for buildings where frontage consents are required under the terms of the ordinances of the city, such frontage consents shall be obtained on the theory that the two streets now constitute only one street, or whether they shall still be treated as two streets.

If this is to be regarded as one street, frontage consents would be necessary from the owners on both sides, and the railroad company could be ignored. If it is to be regarded as two streets, then frontage consents would be necessary from owners on the side on which the proposed building is to be erected and from the railroad company.

The railroad right of way was established there before either of the streets was dedicated. The dedications indicate an intention to treat them as separate streets. The two streets never were connected, and the existence of private property between must always be regarded as conclusive on the question of whether they are to be regarded as separate streets, even though for purposes of street nomenclature a simpler system of names and numbers is adopted.

Neither can it be said that the City Council, in thus renaming the street, added anything to the force of the frontage consent provisions, which, as ordinances in derogation of common law rights, must be strictly construed.

To hold that these are separate streets, places the railroad company in the position of being able to dictate in each instance whether the owner may build the kind of structure he wants to or not. This is contrary to the spirit of the ordi-

nances, which contemplate that the persons who live in residential districts should have something to say about the establishment of businesses that are undesirable. But it is entirely within the power of the City Council to control this situation by the passage of an ordinance confining the frontage consents in such cases to the owners on the side of the street not occupied by the railroad.

We beg to advise you, therefore, that the two streets will have to be regarded as separate streets in all matters relating to the obtaining of frontage consents.

Yours truly,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,
Corporation Counsel.

NOVEMBER 21, 1914.

In re ACCOUNTING UNDER STREET RAILWAY ORDINANCE.

Barrow, Wade, Guthrie & Company,
Monadnock Block,
Chicago, Illinois.

Gentlemen:

In response to your inquiry of November 14th, as to the right of the Chicago City Railway Company, under its ordinance of 1907, to charge to the renewal fund the cost of resetting present iron poles back of curb lines, we advise you that the question of what is or is not a proper charge to the renewal fund is controlled by Section 16 of the ordinance in question. That section defines renewals to be "the replacement of any principal part of said street railways, or of their equipment or appurtenances." In the present instance the poles are not replaced, but continue to be used as theretofore. Their position with reference to the curb is changed but their identity is in nowise changed.

We are, therefore, of the opinion that the cost of resetting said poles is not properly chargeable to renewal fund.

Yours very truly,

CHARLES M. HAFT,
Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,
Corporation Counsel.

NOVEMBER 25, 1914.

In re SALE OF WATER BY SANITARY DISTRICT OF CHICAGO.*Hon. Carter H. Harrison,**Mayor.*

Dear Sir:

You referred to this department a communication from the comptroller and copies of letters addressed to the corporation counsel and the chairman of the finance committee relative to certain leases and contracts for supplying water recently entered into by The Sanitary District of Chicago, with a request for an opinion as to the legality of such a procedure on the part of said Sanitary District.

The comptroller asks whether the city has not the exclusive right for the sale of water within the city limits. It cannot be said that an exclusive right exists. The city has the right to construct water works for supplying water for municipal purposes and for sale to its inhabitants. No limitation, however, is placed on other persons or companies supplying water if they have the means of doing so, except that the city has it within its power to prevent waste of water. In other words, if there was a shortage in the supply, it is possible that the city could enforce provisions which would compel persons and corporations supplying water for others to use, and even those drawing it for their own consumption, to keep within their legitimate needs. With this exception, and the further exception that the city would not be bound to grant privileges in the streets for water mains to convey it, there is nothing to hinder private persons or corporations from drawing a reasonable quantity of water from the general source of supply and using it for their own purposes. (*Beidler v. Sanitary Dist.*, 211 Ill. 628-635.) This is in fact done to a very large extent by industrial concerns using great quantities of water, supplies being drawn in this way from both the river and the lake.

With respect to the Sanitary District drawing an excessive amount of water, that question might arise if the flow from the lake through the drainage channel, which is limited by the United States Government, should be drawn on to such an extent that it would interfere either with the supply of

water or effect its purity. But up to the present time there does not appear to be any ground for raising this question.

We assume, however, that while the comptroller asked the question in this form he had in mind rather the point that the Sanitary District may be exceeding its powers in selling water. This is a matter that has never been decisively passed on and has been a subject of frequent discussion and speculation.

Under the general rule that municipalities can exercise only such powers as are expressly granted to them and such as are necessarily and indispensably connected with the exercise of such powers, The Sanitary District of Chicago is precluded from going into the business of supplying water to consumers.

In the enumeration of powers of the Sanitary District no mention is made of the sale of water, and the authority cannot be inferred from the language used. Under section 7 of the Act of 1889 the Board of Trustees of the Sanitary District is given power to provide for the drainage of the District by laying out, establishing, constructing and maintaining channels, drains, ditches and outlets for carrying off and disposing of the drainage, including the sewage of the District, to make and establish docks adjacent to any navigable channel made under the provisions of the Act, and to lease, manage and control such docks, also to control and dispose of any water power which may be incidentally created in the construction of such channels or outlets. To this was added at a later day express power to construct bridges. These powers are subject to whatever limitation is imposed by section 24 of the original Act, which provides that when the channel is completed and the water turned therein, whenever the General Government shall improve the Des Plaines and Illinois Rivers for navigation to connect with such channel, the General Government should have the full control over the same for navigation purposes.

When this Act was before the Supreme Court on the question of its constitutionality and interpretation, in the case of *People v. Nelson, et al.*, 133 Ill. 565, a point was made that the Act embraces a duplicity of subjects, and the ques-

tion of the right of the Sanitary District to dispose of water power, which is expressly granted by the act, was before the court. The court held that it must recognize that the creation of the water power and dock privileges is not the object or purpose of the Act, but that it is obvious that the accomplishment of the statute, viz., to provide for the preservation of the public health by improving the facilities for the final disposition of sewage and by supplying pure water, will result incidentally in the creation of those privileges, and then used the following language:

“* * * The question is, whether the district having, in the prosecution of its legitimate enterprise, brought these valuable privileges into existence, can utilize them as a source of revenue, for the purpose of paying the indebtedness incurred in the construction and maintenance of said channel and thus lighten the burden of taxation upon the property of the district. To answer this question in the negative would we think be placing upon the incidental powers of municipal corporations a narrower construction than the rules of law require.

Can it be doubted that, if the authorities of the district, in the excavation of their channel, should strike a quarry of valuable building stone, that they would have the right, either with or without express legislative authority, to derive a revenue from the sale of the stone which in the pursuit of their legitimate objects, they are compelled to quarry? And if they should do so, would they expose themselves to the charge of embarking in the independent business of quarrying and dealing in stone? Clearly not. The power to dispose of property thus acquired so as to use the proceeds for legitimate corporate purposes would seem to be undoubted. And it would seem to be equally clear that the Sanitary District having, as an incidental result of the prosecution of its corporate enterprise, created valuable water-power and dock privileges, will have a right to control and utilize those privileges for the purpose of raising a corporate revenue.”

People ex rel. v. Nelson et al., 133 Ill. 565-594.

It must be borne in mind that the court was passing on the question whether the express authority given by the statute to lease docks and sell water power was a constitutional grant of power, and the words used cannot be understood to

mean that the Sanitary District has the right to use for purposes of revenue anything that happens to be within its grasp, whether authorized by statute or not.

So far as we have been able to discover, the above is the only expression of the Supreme Court on the subject of what the Sanitary District may do in the way of using the channel for purposes of revenue. In our opinion it does not authorize the sale of water. It cannot be said that the mere fact that the water passes through the channel gives rise to the incidental power of selling the same to private concerns, and if the Sanitary District undertook to pump water and to dispose of it in that way there is no doubt that it would be exceeding its powers.

The comptroller has called specific attention to the leases made by the Board of Trustees of the Sanitary District on October 29, 1914, to the Atchison, Topeka & Santa Fe Railway Company, wherein the Sanitary District leases certain property to the company for the purpose of erecting pump houses and pipe lines thereon with the right to withdraw water from the channel. The only object of the leases seems to be to provide a means for obtaining water, and the rent for the premises leased for this purpose appears to be based solely on the amount of water to be withdrawn. The leases contemplate a total annual rental of \$950. One of them provides for \$220 rent and the withdrawal of 22 million gallons of water annually, the next for \$200 rent and the withdrawal of 20 million gallons of water, and the third for \$530 rent and the withdrawal of 53 million gallons of water, and each of them provides for additional compensation at the rate of one cent per thousand gallons of water drawn in excess of the amount stipulated. Hence, the leases may be regarded as contracts for furnishing water.

The Act of 1889 gives the Sanitary District power to establish docks and to lease same. The Drainage District's power in this regard is limited to establishing docks and leasing, managing and controlling such docks. If it is necessary to draw water from the channel in order to properly equip and use the dock for purposes of navigation, then the power vested by the statute is sufficient to warrant a lease

authorizing the withdrawal of enough water to successfully and adequately operate the equipment placed thereon for such purpose. Such use of water would merely be incidental to the main purpose. But the drawing of water for purposes of a railroad is not incidental to the use of docks. The fact that the Sanitary District has the right to lease docks does not, in our opinion, carry with it the additional right to sell water to a person to whom it leases a dock for purposes not connected with the use of the dock.

It is contended by the Board of Trustees that the right to the use of the water adjacent to the leased lands can be granted because the Sanitary District owns the land over which the water flows, and that all rights relating to same inhere to that municipality as the owner. Such right appears to vest in the owner of an artificial channel where the owner is a private party. (*Schulte v. Warren*, 218 Ill. 108.) It is claimed that the leases to the Santa Fe Railroad, of which the comptroller speaks, are only extensions of former contracts which included the right to take water from the channel, and that these rights may be granted by the Sanitary District in the same way as a private owner might grant them.

We are not inclined to admit that the mere fact of ownership of the channel gives the Sanitary District the same power to dispose of riparian rights that a private owner would have, and believe that the powers which the Sanitary District possesses in this respect must be found in the statute if they exist. Otherwise, why should there be special provision for leasing, managing and controlling the docks and the waterpower. The enumeration of these powers by statute, under a well-known canon of construction, excludes the exercise of powers not enumerated.

There is good ground, therefore, for believing that the act of the Board of Trustees of the Sanitary District in contracting for the sale of water from the channel is *ultra vires*, and that the same can be stopped by a proper proceeding instituted in the courts. The city's law department, however, can do no more than to give its opinion on the subject as it would on an abstract proposition of law. The right to proceed against the Sanitary District for acting beyond

its powers is vested in the state authorities, and any action instituted must be brought by either the attorney general or the state's attorney. The city cannot force the hand of either of these officials. The proceeding would necessarily be *quo warranto*, and in such a case, when no private rights are involved, the attorney general and the state's attorney are clothed with final discretion. They may bring suit or not as they see fit. (*People ex rel. v. Healy*, 231 Ill. 629.)

In giving expression to this opinion we are not unmindful of the fact that to a limited extent the Sanitary District has been selling water for some time, without protest on the part of the city. A contract was entered into a number of years ago by which the South Side Elevated Railroad Company drew water from the Thirty-ninth street intercepting sewer. The city claimed the right to the compensation. This was contested by the Sanitary District and suit was brought, which was finally compromised and settled on the basis of one-half of the accrued earnings being paid to each of the municipalities. Since then the Sanitary District has continued to supply the water. But inasmuch as that case was not tried, there was no determination of the question of the right of the Sanitary District to supply water to a consumer for purposes of revenue.

We return herewith the letter of the comptroller and the two copies of letters forwarded with your communication.

Yours respectfully,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,
Corporation Counsel.

NOVEMBER 25, 1914.

In re STREET RAILWAY ACCOUNTING UNDER ORDINANCE OF
JANUARY 29, 1912.

BARROW, WADE, GUTHRIE & COMPANY, Monadnock Block, Chicago, Ill.

Gentlemen:

Replying to your inquiry of November 24, as to the account to which the cost of rehabilitating the property au-

thorized to be purchased by the Chicago City Railway under the ordinance of January 29, 1912, should be charged, we are of the opinion that, inasmuch as the ordinance of January 29 provides that the things therein authorized to be done shall be subject to the provisions, conditions, requirements and limitations of the ordinance of February 11, 1907, the terms of the latter ordinance govern the question of the account to which the expense of rehabilitation of the property to be acquired should be charged, and that therefore the cost of rehabilitation should be charged to capital, as provided by the ordinance of February 11, 1907.

Yours very truly,

CHARLES M. HAFT,
Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,
Corporation Counsel.

NOVEMBER 27, 1914.

In re MORTGAGES ON WHARFING LOTS.

HON. JOHN E. TRAEGER, Comptroller.

Dear Sir:

Under date of October 19, 1914, you transmitted to this office a copy of a letter from Messrs. Matz, Fisher & Boyden in reference to four mortgages of \$1,000.00 each on Wharfing Lot No. 18, opposite Lot 2 of Block 20 of the original town of Chicago, for this department "to take steps as will protect the City's interests." You point out that the mortgagors, Joseph T. Ryerson & Son, are desirous of taking up these mortgages; that the matter has been up on several occasions and that as there is no fixed time for the termination of the mortgages, the finance committee, when it last considered the question, refused to permit the cancelation of the obligation. The questions involved in the foregoing have been submitted to the writer for reply.

I have made an investigation and do not deem that it is necessary for the city to take any steps to protect its interests. However, since from the tenor of the letter of Messrs. Matz, Fisher & Boyden, who set forth that they "have advised

the owners (of Wharfing Lot 18) that the provision in the mortgages, that the principal shall be foreborne so long as interest is paid, is for the mortgagor's benefit, and that as no time is fixed for the payment of principal, it is within the power of the mortgagor to pay off the mortgages at any time" and "that upon the tender of the principal and interest due upon the mortgages to the city, the city would be bound to execute a lawful release, and that if the city refuses a tender, a bill to redeem should be filed and money paid into court," and further "asking you to refer this matter to the finance committee of the City Council, in the hope that they may recommend the passage of an ordinance authorizing the release of the mortgages upon the payment of the principal and interest," I take it that you wish an opinion from this department, as to whether or not the mortgagor has a right to insist upon the payment of these mortgages, notwithstanding the fact that no time is fixed for the maturity of the indebtedness secured thereby.

As bearing upon this question, I submit the following: "During the early history of Chicago, there were no buildings on the north side of South Water street, but the same sloped down to the water's edge, and there was much dispute as to the right of using the Wharfing Privileges along the river. Accordingly the General Assembly of Illinois passed an act entitled 'An Act to adjust and settle the title to the Wharfing Privileges in Chicago and for other purposes,' approved February 27, 1847. The preamble to this act sets forth that 'the "Wharfing Privileges," are now, and have been for a long time past made the subject of much controversy between different persons and corporations claiming title to the same,' and to settle these conflicting interests, Section 1 of said act provided that 'the Common Council (of the City of Chicago) is authorized to make and establish all necessary ordinances, rules and regulations, and to make, execute and deliver all such deeds, agreements, leases and conveyances, and to enter into, take or receive any and all such agreements as said Common Council shall deem proper and expedient touching said premises * * *.'"

In pursuance of this act, the Common Council, February

11, 1848, passed an ordinance vacating part of Water street on south side of Chicago River, Section 1 of which recites "that so much and such parts of South Water street as lie opposite block * * * 20 in the original town of Chicago, and north of the line drawn 80 feet distant from the south line of said street, fronting said Water street, and only such parts of said streets as shall be *mortgaged to the City of Chicago to secure the payment of such sums of money and the interest thereon* as are required to be secured to the city by the provisions of Section 5 of the proposition for settling Wharfing privileges on South Water street, * * * passed by the Common Council, February 11, 1848, in the manner herein mentioned, be and the same are hereby discontinued and vacated * * *."

Section 2 provides as follows:

"Before the vacation or discontinuance of any part or portion of said streets, as contemplated in the foregoing section, shall take place, a *mortgage* shall be executed to the city by the respective owners of the various portions of land or town lots in said blocks which are opposite to said parts or portion of said streets as are proposed to be vacated, * * * *to secure the payment of such sums of money and interest thereon as are required to be secured to the city by provisions of Section 5 of the proposition aforesaid; said mortgage to be drawn and executed in such form and manner as shall be approved by the Common Council, or the Mayor or Acting Mayor, and be deposited with the clerk of said city within six months from the date hereof.* The parts or portions of said streets hereby proposed to be discontinued upon the performance of the conditions aforesaid, are designated on a map of the wharfing lots on South Water street * * * made by Asa F. Bradley, City Surveyor, and filed in the office of the clerk of said city, February 11, 1848, as wharfing lots one (1), two (2), * * * *eighteen (18), * * * twenty-nine (29).*"

Under the act and ordinance above set forth, the City of Chicago proceeded to adjust the wharfing lot controversies with the owners of lots lying on the south side of the present South Water street. A form of deed was adopted whereby the city conveyed to the lot owner, the land known as Wharfing Lots, or Wharfing Privileges, lying between a line 80 feet

north of the south line of South Water street and the water's edge, and the person to whom this deed was made by the city gave back as security for the payment of an agreed purchase price a mortgage or mortgages which required the payment of interest at the rate of 6 per cent. per annum, but made no provision when the principal sum of the indebtedness secured by said mortgages should mature. From the long period of time that has elapsed since these transactions were entered into, it is now difficult to locate the original deeds and mortgages, most of which, so far as we are informed, bear date of April 1, 1848. The records of the same were destroyed by fire in October, 1871, and except for such instruments as were re-recorded after the fire, no information is at hand, except such as can be supplied by the Chicago Title & Trust Company from its anti-fire indexes.

An abstract of the four mortgages involved in the matter here in question, shows: That these mortgages were executed by Elisha S. Wadsworth to the City of Chicago, bore date of April 1, 1848 and were re-recorded February 21, 1859, and each conveys a one-fourth part of said Wharfing Lot 18. Each mortgage secured an indebtedness of \$1,000.00, bearing interest at the rate of 6 per cent. per annum, and provided, that in case interest, taxes and assessments were paid promptly second party should forbear and delay the payment of said principal sum and only require the payment of interest.

I have caused a search to be made in the city clerk's office and no trace of the mortgages in question has been found. So far, however, as I am able to ascertain, all of the deeds of conveyance to the owners of Wharfing Privileges and the mortgages in turn given by them to the city were drawn and executed after a uniform form and manner approved by the Common Council or the Mayor. Copies of one of the deeds, one of the mortgages, and a release of a mortgage, all of which were re-recorded after the fire had been furnished me by Mr. Joseph F. Peacock, City Real Estate Agent, and from these I desire to quote and to make such reference as may seem proper to throw light upon the question involved.

The deed from the City of Chicago to Charles Walker, dated April 1, A. D. 1848, contains the following recital:

“That the party of the first part, for and in consideration of the sum of \$3,975.00 *secured to be paid* by the said party of the second part by a certain indenture of mortgage executed to said party of the first part by the party of the second part.” * * * The mortgage referred to was given by Eli B. Williams to the City of Chicago and bears date of April 1, 1848. It contains among other things the following recitals: “The party of the first part is justly indebted to the party of the second part in the sum of \$2,450.00 with interest at the rate of 6 per cent. per annum, payable quarterly at the treasury of said city, that is, on the first days of May, August, November and February in every year, until the *whole sum principal and interest, shall be fully paid and satisfied*” * * * “that said party of the first part for the *better securing the payment* of the money aforesaid, with interest thereon * * *.”

“Provided always, and these presents are upon the expressed condition that if the party of the first part, his heirs, executors, administrators, devisees, or assigns, *shall well and truly pay or cause to be paid* to said party of the second part, its executors and assigns, *the aforesaid sum of money* with interest thereon at the times and in the manner aforesaid, according to the true intent and meaning hereof, that then and in that case these presents and everything herein expressed *shall be absolutely null and void*. And upon the further condition, that, so long as the said party of the first part, his heirs, executors, administrators, devisees or assigns, shall promptly pay the interest to become due on said sum of money on the days it respectfully falls due, as aforesaid, and in the manner aforesaid, and shall pay all taxes and assessments legally levied or assessed on said premises as they become due and payable, said City of Chicago, its executors and assigns shall *forbear and delay* the payment of said principal sum of money and shall require the payment of the interest thereof at the *times and in the manner aforesaid* * * *.”

“It is hereby stipulated and made a part of the contract between the parties hereto, that the principal of the moneys *which shall be paid or secured to the City of Chicago* upon the

adjustment or settlement of the title of the Wharfing Privileges or, public landings, including the money secured by this indenture, shall be denominated the "Wharfing lot fund" and shall be applied and appropriated as follows: The first \$30,000.00 of said principal *which shall be paid* shall be appropriated by the City of Chicago in discharge of its obligations, or in such other manner as the Common Council shall at times direct. *The residue of said principal, as the same shall be paid*, shall be paid over to the agent of the school fund of said city, or his successor, by whatever name he may be known, and shall constitute a part of the principal of the school fund of the City of Chicago for the support of schools in said city and shall be loaned in the same manner as the principal of other school funds may be loaned * * *."

"It is hereby further stipulated between the parties to this indenture that nothing herein contained shall be so construed as to subject any property of the first party hereto, or of his heirs, executors, administrators, devisees or assigns, except that *secured in this indenture, to the payment of the indebtedness herein mentioned* * * *."

The release to the above referred to is by the City of Chicago to George Smith, releasing all the right, title, interest, claim or demand whatsoever said city may have acquired in, through or by a certain mortgage deed bearing date the first day of April, A. D. 1848, and releases all of that part of Wharfing Lot 3, in Block 16, in the original town of Chicago, described as the West 11½ feet of the West ½ of Wharfing Lot 3.

It appears that by the act of February 27, 1847 above quoted from, the Common Council was authorized to pass all ordinances and make such necessary agreements, and receive such agreements as were necessary to make a settlement of the Wharfing Privileges; that under the ordinance of February 11, 1848, the portions of South Water street that were vacated and sold and conveyed to property owners, were mortgaged by those owners to secure the payment of the purchase price, the forms of mortgage and of deeds to be approved by the Common Council or by the Mayor; that from the form of the deed itself, the purchase price agreed upon was "secured to

be paid'' and from various recitals in the mortgage set forth in the above quoted portions, it is quite clear that payment of the principal was contemplated, since by one of these recitals, provision is made for the appropriation of the ''first \$30,000.00 of said principal, which shall be paid''; and the release deed quoted from shows that the City of Chicago has actually released the Wharfing lot from one of these mortgages. The only uncertain element is that the time of maturity of the indebtedness was not fixed by the mortgage. To supply this absence of date of payment, two principles of law may be referred to:

First. That the provision not fixing any date of payment is for the benefit of the mortgagor, who would pay at any time he saw fit, and it is not for the mortgagee to deny this right of payment or refuse to accept the money since from the contents of the instruments and the ordinances under which they were executed, it is very clear that payment of the principal was intended.

Second. That since no date of maturity or payment is specified, the law will presume that the indebtedness, if not payable at the option of the mortgagor, may certainly be paid within a reasonable time, and that since this indebtedness was contracted and the mortgage executed on April 1, 1848, a more than reasonable time has elapsed since said date, and that the mortgagor is now entitled to make payment at any time he may elect. Any other construction of such instrument would imply that the indebtedness is perpetual and never to be discharged, but this position can not be sustained, for the language of the deed and the mortgage is too clear to permit of this view and clearly sets forth and implies that the indebtedness is to be paid.

Respectfully submitted,

JAMES G. SKINNER,

Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,

Corporation Counsel.

NOVEMBER 27, 1914.

In re STEPS, IF ANY, TO BE TAKEN WITH A VIEW TO PREVENTING THE EMPLOYMENT OF UNLICENSED PLUMBERS IN THE DOING OF WORK BEING DONE FOR THE SOUTH PARK COMMISSIONERS.

WILLIAM H. LUTHARDT, Esq., Secretary, Board of Examiners of Plumbers.

Dear Sir:

We have your letter of the 24th instant in regard to the above entitled matter. In this you ask us to advise you as to (1) whether the board can order the work stopped because of the fact that it is being done in violation of Section 1782 of the City Code; and (2) whether, if the section of this ordinance does not apply, you can proceed under the statute creating the board of examiners of plumbers to stop this work.

The Supreme Court of this state has decided that the several boards of park commissioners in this city, which under statutory authority control and govern the park districts, are separate and independent municipal corporations; that each of them is, within the purview of its authority, entirely independent of the City of Chicago. *West Chicago Park Commissioners v. Chicago*, 152 Ill. 392; *Montgomery Ward v. Field Museum*, 241 Ill. 496. In view of the doctrine asserted in these and other decisions of the Supreme Court, we think it is at least doubtful if the board of examiners of plumbers of the City of Chicago has such jurisdiction within the park district as would authorize it to enter upon the territory of the district and to forcibly stop plumbing work there being done on the ground that it is being done by unlicensed plumbers.

But it is provided by Section 1782 of the Municipal Code of 1911 that "No person, except a licensed plumber, shall be permitted to make any alteration or repair to or do any work in or about any pipe or pipes connected with any part of the city water works system, or with any pipe or sewer connected with the city sewer system."

We are inclined to think that the city might properly, in exercise of the power given by this section, notify the park commissioners that no water pipes laid by unlicensed plumbers would be allowed to connect with, or take water from, the city

water mains. If such a warning could not be carried into effect by the city, without also shutting off other pipes, not laid by unlicensed plumbers, that would be the fault of the park commissioners and not of the city. The commissioners could at any time put themselves in a position to receive water for their main system by disconnecting the particular pipes objected to.

- However, for the reasons which follow, we do not deem it as yet necessary to express any definite opinion upon either of the two questions stated above. From a conversation had by the undersigned with you, we gather (1) that your object in this matter is to prevent the employment in the future of unlicensed plumbers by the park board or its contractor and (2) that no representation with regard to this matter has yet been made by you to the park board. It is at least possible that the park board may have both the power and the will to cause its contractor to cease employing unlicensed plumbers if the matter is brought to its attention.

We would, therefore, suggest that, before any coercive measures are taken or threatened, you should forward a copy of this letter to the park board and ask them if they will not take steps to cause their contractor to cease employing unlicensed plumbers.

If they shall decline to do anything in this direction, or claim that they are unable to control the action of their contractor in the matter, it will then be time enough for us to give you a definite opinion as to whether there is any form of coercive action which your board or the city can take in the matter.

Yours respectfully,

WILLIAM DILLON,
Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,
Corporation Counsel.

NOVEMBER 28, 1914.

In re SERIAL ISSUANCE OF CITY BONDS.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

In response to your request for information as to the provisions of the law relative to serial bond issues and the purchase of bonds by the Sinking Fund Commission, we beg to state that there is no provision of either the statutes or the ordinances which requires municipal bonds to be issued in serial form as is now the custom.

The practice of issuing bonds in this way is the result of an administrative policy adopted by the department of finance about ten years ago. The first issue of serial bonds was in 1904, when a series of judgment refunding bonds was issued in this way. There was no order of the City Council to that effect, but the plan was determined upon as obviating the necessity for keeping close watch on maturing bonds for years in advance in order to make increased levies of taxes at times when the tax rate would not be unduly increased thereby. The former method of levying taxes at uncertain intervals for maturing bonds resulted in disproportionate taxation from year to year in spite of that precaution, and moreover resulted in the necessity of paying interest for years at times when the money to pay the principal was already in the treasury. There was no way of taking up bonds at that time except at maturity, so that even the saving that is now effected by the purchase of bonds by the sinking fund commission was not possible. Consequently, when the policy of issuing bonds in serial form was adopted it was found that it resulted in a large saving of interest. All bonds issued since the ones mentioned above have been in serial form.

Prior to that time there was no attempt made to levy an annual tax for a sinking fund for each individual issue of bonds. The Constitution (Article IX, Section 12) contains the following provision:

“* * * Any county, city, school district, or other municipal corporation incurring any indebtedness as aforesaid, shall before, or at the time of doing so, provide for the collection of a direct annual tax sufficient to pay the interest on such debt as it falls due, and also to

pay and discharge the principal thereof within twenty years from the time of contracting the same. * * *.”

This was understood to mean that an annual tax sufficient to pay interest had to be levied each year, but that it was not necessary to provide an equal amount each year for the retirement of the bonds.

The act concerning the purchase of sinking funds by the Sinking Fund Commission was passed on June 4, 1909. The first section of same creates the commission; the second section is as follows:

“Whenever there shall be in the sinking fund of any city, village or incorporated town a sum in excess of that required for the payment of the bonded indebtedness of such city, village or incorporated town maturing in that or the succeeding fiscal year, and the interest due in that period, the sinking fund commission may use such excess in the purchase of the outstanding bonds for the payment of which, at maturity, such sinking fund was or shall be created, paying therefore no more than the market price. When any such bond is so purchased, it shall be canceled, and thereafter no taxes for the payment of such bonds or the interest thereon shall be levied. No further appropriation by such city, village or incorporated town, shall be required for the application of money in such sinking fund to the payment of such bonds than is made hereby.”

The above is the only section which relates to the duties of the commission. The third section is the usual emergency section designed to put the law into effect immediately.

Inasmuch as all bonds now issued require a tax levy from year to year to retire that portion of such issues maturing at the beginning of the next year, there is no such thing as the accumulation of a sinking fund which is not immediately required for the retirement of maturing bonds. It will be noted that the law creating the sinking fund commission prohibits the use of funds collected for sinking fund purposes which are necessary to take up the bonds maturing the following year. Hence, under the present plan of issuing bonds it is only a question of a few years before there will no longer be any occasion for exercising the power to buy bonds in the open market with sinking funds on hand.

We return herewith the letter of the comptroller ad-

dressed to the City Council and the memorandum of purchase attached thereto.

Yours respectfully,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,

Corporation Counsel.

NOVEMBER 30, 1914.

In re RIGHT OF SURFACE COMPANIES TO TAKE OFF THROUGH
ROUTES MENTIONED IN ORDINANCE OF JULY 15, 1912,
WITHOUT THE APPROVAL OF THE CITY.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

In your letter of November 18, 1914, you transmit a communication from the chairman of the Committee on Local Transportation dated November 17, 1914, and ask us to furnish you with an opinion as to the right of the traction companies to take off "through routes" without the approval of the City Council.

The through routes referred to in the letter of the chairman on local transportation are those authorized in and by the ordinance of July 15, 1912. This ordinance has been accepted by the traction companies named therein. Said ordinance of July 15, 1912 (Journal of the Proceedings of the City Council, page 1370 of that date) provides in part as follows:

"Be it ordained by the City Council of the City of Chicago:

SECTION 1. That in accordance with Section 13 of an ordinance granting rights to the Chicago City Railway Company, passed February 11, 1907, in accordance with Section 13 of an ordinance granting rights to the Chicago Railways Company passed February 11, 1907, and in accordance with the terms and provisions relating to joint through service contained in an ordinance granting rights to the Calumet & South Chicago Railway Company passed March 30, 1908, the following through routes are substituted in place of the through routes mentioned in said ordinances:"

(Then follow twenty-three through routes.)

The through routes "*mentioned in said ordinances*" are those contained under the heading of Exhibit "C" of the ordinances of February 11, 1907. As to the through routes contained under this heading (Exhibit "C") Sections 13 of the ordinances to the Chicago Railways Company and the Chicago City Railway Company respectively provide in part as follows:

"The parties now concerned have agreed upon certain through routes which are particularly described in Exhibit 'C,' which is attached hereto and made a part hereof, with the same force and effect as if herein fully set out.

The company may establish other through routes from time to time and may discontinue the same, if and when the traffic warrants such establishment or discontinuance but no through route specifically established by this ordinance and said Exhibit 'C' shall be discontinued without the consent of the City Council of said City, * * *."

The through routes mentioned and described in said ordinance of July 15, 1912, were by agreement of the parties to the ordinances of February 11, 1907, "*substituted in place of*" the through routes mentioned in said ordinances of February 11, 1907.

We are of the opinion that the through routes which were by the ordinance of July 15, 1912, substituted for the through routes mentioned in the two ordinances of February 11, 1907, stand in the place of and are subject to all the provisions of said last mentioned ordinances applicable to the through routes mentioned in the exhibits attached thereto as Exhibit "C."

It follows that inasmuch as the through routes mentioned in Exhibit "C" could not be discontinued without the consent of the City Council, the street railway companies do not have the right to discontinue the substituted through routes mentioned in said ordinance of July 15, 1912, without the consent of the City Council.

We are returning herewith letter of Eugene H. Block, addressed to you dated November 17, 1914.

Respectfully,

MAX M. KORSHAK,
Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,
Corporation Counsel.

NOVEMBER 30, 1914.

In re PROHIBITION OF HEAVY TRAFFIC ON STREETS NEAR HOSPITALS.

TO THE HONORABLE, THE CITY COUNCIL OF THE CITY OF CHICAGO.

Gentlemen:

At the meeting of your Honorable Body held November 18, 1914, an order was passed which appears on pp. 2076-2077 of the Journal of the Proceedings of the City Council of that date, as follows:

“WHEREAS, There are eighty-five duly licensed hospitals in Chicago in which there are thousands of patients, most of whom are seriously ill; and,

WHEREAS, Many complaints are made relative to the discomforting and distressing noises incident to heavy traffic in the vicinity of these institutions;

BE IT ORDERED, That the Corporation Counsel be and he is hereby directed to advise this Council at its next regular meeting the powers of the City of Chicago to abate this nuisance, either by diversion of traffic or otherwise.”

In the case of *People v. Walsh*, 96 Ill. 232, and also in the case of *Cicero Lumber Company v. Town of Cicero*, 176 Ill. 9, our Supreme Court referred with approval to and made the following quotation from the case of *People v. Kerr*, 27 N. Y. 188:

“So far as the existing public rights in these streets are concerned, such as the right of passage and travel over them as common highways, a little reflection will show that the legislature has supreme control over them. When no private interests are involved or invaded, the legislature may close a highway and relinquish altogether

its use by the public, or it may regulate such use or restrict it to peculiar vehicles, or to the use of particular motive power. It may change one kind of use into another, so long as the property continues devoted to public use. What belongs to the public may be controlled and disposed of in any way which the public agent sees fit."

In Cicero Lumber Company case, *supra*, the opinion also quotes from Dillon on Municipal Corporations as follows:

"As respects the public or municipalities, there is, in the absence of special constitutional restriction, no limit upon the power of the legislature as to the uses to which streets may be devoted."

Among the powers conferred upon cities by Section 1 of Article V of the Cities & Villages Act, are the following:

"NINTH: To regulate the use of the same. (Referring to streets, alleys, etc.)

SEVENTY-FIFTH: To declare what shall be a nuisance, and to abate the same; and to impose fines upon parties who may create, continue or suffer nuisances to exist.

SIXTY-SIXTH: To regulate the police of the city or village, and pass and enforce all necessary police ordinances.

SEVENTY-EIGHTH: To do all acts, make all regulations which may be necessary or expedient for the promotion of health or the suppression of disease."

The contemplated ordinance would manifestly be one in the interest of the public health, having a plain and substantial relation thereto, and its provisions would tend to promote and preserve the health of the inhabitants of the city by relieving patients in hospitals from the damaging effects from noises incidental to heavy traffic in the streets in the immediate vicinity of such institutions.

Municipalities are allowed a greater degree of liberty of legislation in the direction of measures in the interest of the public health than any other. In the case of *Gundling v. City of Chicago*, 176 Ill. 340, our Supreme Court, referring to paragraphs 66 and 78 hereinabove quoted, said:

"Paragraph 66 before quoted expressly authorizes the adoption of ordinances necessary to police power, and paragraph 78 is an express authorization of the City Council to make all regulations necessary or expedient for the promotion of health or the suppression of disease..

Under these two provisions express authority is granted the municipality to pass all ordinances or requirements tending to promote the public health, morals, security, comfort and welfare of the community. Such legislation is included within the provision authorizing the enactment of police regulations. The most important of police powers is that of caring for the health of the community, and that is inherent in a municipality, and may be exercised whether expressly granted or not, because the preservation of the health of the public is indispensable to the existence of the municipal corporations.”

It will be observed from the foregoing quotations that restrictions upon the use of streets should not invade the property rights of the owners of property abutting on the streets. Speaking upon the subject of the private rights which should not be so violated the Supreme Court in *Cicero Lumber Company case*, *supra*, said, at page 25:

“Ordinarily, such private rights are the rights of abutters, or property owners owning property fronting upon such street, and not the rights of citizens as to the character of the vehicles which they may drive over the streets.”

Provision should, therefore, be made in the contemplated ordinance for permitting traffic vehicles to have access to premises abutting on streets from which the traffic would by the ordinance in general be excluded, and also for permitting such traffic vehicles to use such streets for the purpose of reaching premises to which such streets afford the only means of access. Similar provisions are to be found in the ordinances of the various park boards in respect to the use of boulevards and parkways.

We are, therefore, of the opinion that an ordinance forbidding the use of streets by heavy traffic vehicles within a reasonable distance of hospitals, safeguarding the private rights of property owners as above indicated, would be a reasonable measure in the interest of the public health and would not be invalid.

Your attention is directed to Article III of Chapter LXXIII of The Chicago Code of 1911, creating zones of quiet within a distance of 250 feet of every hospital in the City of Chicago, also to the draft of an ordinance providing for the

establishing of temporary zones of quiet around residences in which persons are dangerously ill which was transmitted to your Honorable body by the Mayor on October 19th, 1914, and on said date referred by your Honorable Body to the Committee on Health.

Yours respectfully,

VERNON L. BEAN,
Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,
Corporation Counsel.

DECEMBER 1, 1914.

In re PROHIBITION OF FUTURE NEW LOCATION OF SALOONS
WITHIN 250 FEET OF CHURCHES AND SCHOOLS.

HON. WILLIS O. NANCE, Chairman, Committee on Health, City
of Chicago.

Dear Sir:

Your Committee instructed the Corporation Counsel to prepare an ordinance prohibiting the issuance of saloon licenses to conduct saloons within 250 feet of any church or school, excepting in premises now being so conducted. I enclose herewith such an ordinance.

You further instructed the Corporation Counsel to prepare an opinion on the validity of such an ordinance, as it was suggested by members of the Committee that a discrimination in favor of saloons already existing will be an unjust discrimination and would render the ordinance void.

There have been many cases presented to the courts arising from ordinances of this kind. In *City of Chicago v. Ripley*, 241 Ill. 466, the court was considering an ordinance which provided that no lumber should be piled for storage within 100 feet of any private residence unless the residence had been erected after the establishment of the yard. The court held this ordinance to be valid.

In *Martens v. People*, 186 Ill. 314, the Supreme Court considered an ordinance of the City of Moline. The ordinance was to the effect that in any block where no saloon then existed, no license to keep a saloon should be issued without a petition

signed by two-thirds of the free holders in said block praying that such a license should be issued. It will be seen that the ordinance imposed a greater burden upon an application in a block where no saloon existed than it did upon an application in a block where a saloon already existed.

The Appellate and Supreme Courts upheld the ordinance. The opinion of the Supreme Court in the case of *Martens v. People, supra*, contains the following language: (page 318)

“It is also said this ordinance attempts to discriminate between different blocks, and between different parts and portions of the city, and between different persons possessing the same property interests, and is therefore void. The language of the ordinance admits of no such construction. It is uniform in its operation.”

In view of the above and other decisions, I believe that the accompanying ordinance is a valid one.

Your Committee engaged in considerable discussion about the present status of saloons within 250 feet of a church or school. I informed your Committee that there is at present no ordinance regulating the proximity of saloons to churches or schools. I explained that these matters now rest within the sound discretion of the Mayor.

The courts in a number of cases have upheld the right of the Mayor to refuse a license where in his discretion the proposed dramshop was too close to a school, church, hospital or other public institution, and this in the absence of any ordinance fixing the distance.

Harrison v. People, 222 Ill. 150;

Swift v. People, 63 Ill. App. 453;

Kretzmann v. Dunne, 228 Ill. 31.

I am informed that for a long time past it has been the practice of the Mayor to refuse licenses to operate dramshops within 250 feet of a school, church or public institution, unless the saloon has been there for a considerable period of time.

Should the proposed ordinance be passed, it might operate to define the power of the Mayor in regard to distances and it might be held to compel the Mayor to grant a license where the proposed dramshop was more than 250 feet from such institution however desirable it might be to withhold the license. In

the elastic condition in which the law now is, I believe that under proper circumstances the Mayor might refuse a license for a dramshop within even as great a distance as 500 feet, whereas, if the ordinance is passed, it might be contended that 250 feet is the limit for all purposes.

I desire to call your attention to the fact that Section 1545 of The Chicago Code of 1911 is in a measure like the proposed ordinance in that it prohibits the issuance of licenses upon boulevards but exempts certain territory.

Respectfully submitted,

GEORGE L. REKER,
Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,
Corporation Counsel.

DECEMBER 1, 1914.

In re STREET RAILWAY ACCOUNTING OF PAVING COST.

MESSRS. BARROW, WADE, GUTHRIE & Co., Monadnock Block,
Chicago, Illinois.

Gentlemen:

Replying to your communication of November 23rd, 1914, wherein you request that we advise you to what account the cost of paving should be charged.

(1) During the rehabilitation period;

(2) During the period subsequent to immediate rehabilitation;

we beg to advise you that the subject which you desire us to consider is controlled by Section 15 of the Chicago City Railway Company ordinance of February 11th, 1907. That section provides in part as follows:

“The company shall, at its own expense, fill, grade, pave and keep in repair that portion of the streets occupied by it, as more specifically provided for in said ‘Exhibit B.’”

If in this section the Council said what it meant and meant what it said, there is no room left for construction because by the language to which we have referred and which is free from ambiguity, the expense of paving both during and

after the period of immediate rehabilitation is one imposed upon the company.

If the company, as this section indicates, is to bear the expense of paving under all circumstances there would seem to be but one account to which expenditures for paving might be charged and that would be the personal account of the company or its 45 per cent. of the net receipts of each year's operation.

Yours very truly,
CHARLES M. HAFT,
Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,
Corporation Counsel.

DECEMBER 1, 1914.

In re RIGHT OF SURFACE AND ELEVATED RAILROADS TO CARRY
COUNTY PRODUCE AND LIGHT EXPRESS.

HON. EUGENE BLOCK, Chairman, Committee on Local Transportation.

Dear Sir:

In your letter dated October 16, 1914, you ask us to furnish the committee on local transportation with an opinion as to the powers of both the surface and elevated street railroads under the present ordinances, laws and charters to carry country produce through the streets of the city during restricted hours to market places, either by transporting such produce in their own cars or in the cars of other companies connecting at the city limits. You also desire an opinion as to whether, under the existing laws, the City Council may amend the ordinances to confer valid powers on the street and elevated railroad companies for such purpose.

Leaving out of consideration the effect of the public utilities act, we beg to submit the following:

The Chicago Railways Company, by its charter, is empowered to construct, own, purchase, lease or otherwise acquire street railroads in the City of Chicago and in the Counties of Cook, Lake, McHenry, Du Page and De'Kalb, in the State of Illinois, and to operate the said railroads, owned,

leased or otherwise acquired by it, with animal, cable, electric or other power authorized by law and to own and enjoy all real or personal property necessary or proper for the prosecution of the business aforesaid.

The Chicago City Railway Company is created by a special act of the legislature; the title of which act is, "An Act to promote the construction of horse railways in the City of Chicago," and the corporation is empowered "to construct, maintain and operate a single or double track railway with all necessary and convenient tracks for turn-outs, side tracks and appendages in the City of Chicago, and in, on, over and along such street or streets, railway or railways, bridge or bridges, river or rivers within the present or future limits of the south or west divisions of the City of Chicago, as the Common Council of said city have authorized said corporators, or any of them, or shall authorize said corporation so to do, etc."

The charter powers of the Chicago Railways Company are expressly limited to the construction and operation, etc., of street railways; whereas, in the charter of the Chicago City Railway Company the word of limitation "street" is not employed. Nevertheless, it seems to us that in view of the title given the act creating the Chicago City Railway Company the courts would be inclined to hold that its powers were limited to the construction and operation of street railways, as was held in *State v. Duluth*, 57 L. R. A. 63-75.

Chapter 131a of Hurd's Revised Statutes of 1913, which provides for the incorporation of "Street Railroads," does not prohibit street railroads from carrying freight. Section 3 of this act provides that a municipality may grant consent "for any period not longer than twenty years on the petition of the company upon such terms and conditions not inconsistent with the provisions of this act as such corporate authorities or the county board, as the case may be, shall deem for the best interests of the public."

There can be no question that under the charters of the surface companies and under the law applicable to this subject the surface lines are *street railroads* as distinguished from *commercial railroads*.

The question arises, whether the incidental carrying of farm produce through the streets by the surface companies during restricted hours operates to transform surface lines from street railways to commercial railroads. If it would, then the companies would be prohibited from carrying on the business of a commercial railroad because of the charter limitations of the surface companies. Furthermore, complications would arise with abutting property owners who own the fee to the center of the street. The Supreme Court of this State has held that a commercial railroad is an additional servitude and that abutting owners who own the fee to the center of the street are entitled to compensation from such commercial railroads for the use of such streets.

Wilder v. Aurora, Etc. Traction Co., 216 Ill. 493.

Until comparatively recently it has been generally considered that the distinctive and essential feature of a street railway is that it is used exclusively for the transportation of passengers and their ordinary hand luggage and not for freight.

Nellis on Street Railways says in Section 1:

“The primary meaning of street railway or street railroad is one constructed and operated on and along the streets of a city or town for the carriage of persons from one point to another in such city or town or to and from its suburbs. And street railroads are generally understood to be only such as are constructed and operated in the streets of a city for the purpose of conveying passengers, with ordinary hand luggage, from one point to another along the line thereof. * * *”

The Illinois cases in defining and distinguishing street railways and commercial railways have said that street railways are such as are constructed and operated in the streets of a city for the purpose of conveying passengers and ordinary hand luggage.

In *Spaulding v. M. & W. I. Ry. Co.*, 225 Ill. 585, at pages 590-1, the court says:

“Street railroads are generally understood to be only such as are constructed and operated in the streets of a city for the purpose of conveying passengers, with ordinary hand luggage, from one point to another along the

line thereof. Whether the road be a street railroad or not will depend upon the character of its traffic. The bill alleges that this road "is carrying not only passengers with ordinary hand luggage, but practically freight of all kinds from one point to another on the street and from town to town along the entire line of the road. Under these allegations of the bill, admitted to be true by the demurrer, defendant in error cannot be held to be a street railway."

In *City of Aurora v. Elgin Trac. Co.*, 227 Ill. 485, at page 496, the court says:

"Commercial railroads embrace all railroads for general freight and passenger traffic between one town and another, and street railways embrace all such as are constructed and operated in the public streets for the purpose of carrying passengers with the ordinary luggage from one point to another on the street."

In *Harvey v. Aurora and Geneva Ry. Co.*, 174 Ill. 295, at page 307, the court says:

"There is a wide and well understood difference between a railroad organized for *general traffic*, and a *street, horse or dummy railroad*, and in placing a construction on the act in question, in order to arrive at the intent of the legislature, the functions, duties and purposes of street or horse and dummy railroads must be kept in mind. A street railroad, as is well understood, is a road constructed on a street or highway for the purpose of conveying passengers living upon or having business on such street or highway, its main object being to accommodate street travel. For this purpose the cars make frequent stops to take on and discharge passengers along the street or highway. Constructed, as it is, upon a public street or highway, it has no use for private property, unless it might need a small tract for a side-track, turn-out or station, as an incident to its main line."

It is true that in the foregoing cases the Supreme Court has defined street railways as those devoted to carrying passengers "with ordinary hand luggage" from point to point in a city. In the above cases, the courts were not called to pass on the point as to whether *street railroads* were empowered to carry freight. In these cases the courts have simply characterized street railroads as those engaged in the carrying of passengers from point to point within the limits of a city on

public streets, and where hand luggage accompanied the passenger. The above cases do not pass upon the precise point as to whether a corporation organized* under its charter as a street railroad changes its character as a street railroad and becomes a commercial railroad by reason of its incidental carrying of freight or light express matter along the streets of a city.

Nor has the question as to whether the street railways would exceed their charter powers by the carriage of goods been squarely presented to or decided by our Supreme Court.

In other States the courts have decided that corporations organized as street railways and operated as such have authority to carry freight.

In *The State of Ohio v. The Dayton Traction Company et al.*, 18 Ohio Circuit Court Reports 490, the statute, as in our case, was silent as to the power of the street railroad corporation to carry freight. The corporation was admittedly a street railroad. While the decision is by a *nisi prius* court the decision is entitled to respect because of the persuasive reasoning, and because further the right of street railroads to carry freight was squarely presented. At page 494 the court said:

“A railroad also is used for the transportation of persons and freight, and yet a ‘railroad and a street railway are distinct and different things’ (*Mass. Loan & Trust Co. v. Hamilton*, 88 Fed. Rep. 588; *Louisville & Portland R. R. Co. v. Louisville City Ry. Co.*, 2 Duv. 175); but the distinction is not that one is for the transportation of both persons and freight and the other for the carrying of passengers only. There is no inherent distinction in this respect.”

and at page 496, the court said:

“And if the reason street railway companies did not carry freight was not because the law or the purposes of their creation precluded them from doing so, but because the state of the art was such that they were not able to serve the public in that way, then it is no reason that they should not do so now, for a street railway company is not limited to the methods of operating its road known and in actual use at the time of the passage of the act authorizing it to construct and operate its road. (*H. R. T. Co. v. W. T. & R. Co.*, 135 N. Y. 393; *Easton, S. E. & W. E. P. R. Co. v. Easton*, 133 Pa. St. 505.) And if its existence in the street was justified on the ground

that it facilitated the use of the street in the carrying of passengers, it is doubly so now, that, by its enlarged field and improved methods of operation, it serves the public by the transportation of both freight and passengers."

In *The State of Ohio v. The Dayton Traction Co.*, 64 Ohio St. Reports 272, the question was whether "a street railway company formed for the purpose of building and maintaining a 'street railroad' had the power to transport freight by freight cars or otherwise over the streets of a municipality of Ohio * * *." The court in deciding that it had the power, said at page 281:

"Counsel for the plaintiff in error urge as conclusive of the subject numerous texts and decisions in which street railroads are defined as carriers of passengers. Usually they have been so defined for the obvious reason that until recently they were exclusively engaged in the carriage of passengers; but the general definition cannot be material in view of recent legislation in which the term is applied to roads constructed upon highways, interurban as well as urban, the only requirement being that in construction and operation they shall be consistent with the former and ordinary use of such highways, and in which legislation, provision is made for the carriage of merchandise."

We also call your attention to *The Cedar Rapids & Marion City Railway Company v. The City of Cedar Rapids, et al.*, 106 Iowa 476. Here the question arose whether the railroad corporation should be assessed for taxation purposes by the state executive council or by the local assessors. It was essential to determine in this case whether such corporation was a street or railroad corporation. The company here operated lines of railway in the City of Cedar Rapids; lines of railway owned by this company also passed out of the city limits connecting neighboring towns. Cars were operated on said tracks by electric power, mainly for the carriage of passengers but four cars were used for the carrying of freight between said cities and it also carried such express matter as was offered at either end of the line or at any point between. There were no freight or passenger depots or agents along the line, as commercial railroads have, but the cars took up and

discharged passengers and express matter at cross streets and at other convenient points. As the court said at page 478,—“In short, it was operated in all its branches as street railways are operated, except that it received and carried freight and express matter, to a limited extent, between the two cities.”

The court said at pages 479, 480 and 481:

“That there is a distinction is not questioned, but the dispute is as to which class the plaintiff corporation belongs. See *Fidelity Loan & Trust Co. v. Douglas*, 104 Iowa 532. The development of railways in and about towns and cities has brought the question before the courts whether a particular railway was a street or commercial railway, and the question has always been determined in the light of the statute and the facts of the particular case. The part of this road extending from Cedar Rapids to Marion was constructed and operated by the plaintiff corporation, under authority of chapter 32, Acts Eighteenth General Assembly. See *Linn County v. Hewitt*, 55 Iowa 507. The act relates expressly to street railways, and authorizes the extension of such railways beyond the limits of the city or town, the location thereof along any portion of a highway which is of a width of one hundred feet or more, and the operation of the railway by either animal or motive power. The fact that the line between Cedar Rapids and Marion was laid and operated along the highway as authorized by said act, relating exclusively to street railways, seems to us conclusive that the plaintiff is a street railway corporation and not a railway corporation, within the meaning of said section 1317, Code 1873. The fact that plaintiff's street railway was authorized to be extended and laid and operated along a highway, precludes the conclusion that it was intended to be other than a street railway. Street railways constructed and operated as they are in streets and highways do not exclude other travel therefrom; but not so as to other railways constructed and operated along a street or highway. Plaintiff's railway is identical in its construction and operation with other street railways, except in that it carries freight and express, to a limited extent, as well as passengers, while most others carry passengers only. It is unlike other than street railways in almost every other particular. It is insisted that this alone distinguishes it from street railways, and authorities are cited wherein it is said that a ‘distinctive and essential feature of a street railway in relation to other

railroads is that it is exclusively for the transportation of passengers, and not for goods.' Ordinarily that is true, but in this case we have a street railway corporation organized to operate a street railway in the city of Cedar Rapids, extending its railway beyond the limits of said city, under authority of said chapter 32, Acts Eighteenth General Assembly, expressly relating to street railway companies. Surely the mere fact that plaintiff carries goods and express matter does not take it out of the class of railways where this statute puts it. It is not a 'railway corporation,' as contemplated in said section 1317, but a street railway, and is therefore subject to assessment by the local assessors.'

We also call your attention to a line of cases decided by courts in other states which hold that although interurban electric railroads carrying both passengers and freight are commercial railroads, nevertheless the carrying of freight by such railroads on the streets of a municipality does not make such railroads an additional servitude upon such streets entitling the abutting owners who own the fee to the center of these streets to compensation. While these cases are opposed to the doctrine laid down by the Supreme Court of this State, we mention them as showing how far the courts of other States have gone to sustain the right of even commercial railroads which do a street railway business in cities to carry freight. These cases recognize the principle that streets are dedicated to the public and that the transportation of merchandise on the streets is as proper a use as the transportation of passengers.

The following are the cases referred to:

Mordhurst v. Ft. Wayne, etc., Traction Co., 163 Ind. 268.

Kinsey v. U. Traction Co., et al., 169 Ind. 565.

Montgomery v. Rwy. Co., 104 Cal. 186.

While it appears that such expressions as the courts of Illinois have delivered strongly incline to limit street railways as such, to the transportation of passengers, we do not think that our Supreme Court has definitely committed itself to the doctrine that a street railway organized as such and operating within the limits of a municipality cannot carry merchandise as well as passengers.

In view of the decisions of other states where the question has been squarely presented, and the strong reasoning found therein, it is possible that our Supreme Court, if called to pass squarely upon the question, would sustain the right of street railways organized and operating as such within the limits of the municipality to carry merchandise as well as passengers, if a showing were made that the carriage of such merchandise did not interfere with the primary use of such street railways, to-wit, the carrying of passengers. Until our Supreme Court has definitely decided this question, it must, however, be regarded as involved in doubt.

While there is doubt as to the power of street railways under their charters to carry freight, there is no doubt that the city has the right by ordinance to consent to the carriage of merchandise by street railways and elevated railroads. In view of the fact, therefore, that the power of street railways to carry merchandise is enveloped in doubt, and in view of the further fact that there is some question as to whether the elevated railroads, by reason of their ordinances forbidding them to carry freight, would not, in addition to procuring the ordinance right to carry freight, also be required to procure additional frontage consents therefor (*McCartney et al. v. C. & E. R. R. Co., et al.*, 112 Ill. 611), we suggest that the matter be taken up with the street and elevated companies for the purpose of ascertaining whether they consider that there are legal obstacles to the acceptance by them of ordinances granting them such rights.

With regard to the question of permitting the surface companies to use their own cars from points outside of the limits of the city, we beg to state that the city has always taken the position that the surface lines have no right to operate outside the limits of the city. There is also some serious question as to the right of the city to grant an ordinance to interurban companies doing business outside the limits of the city to come into the city on the tracks of the surface and elevated companies along streets without a compliance by such

interurban companies with the provisions of the frontage consent law.

Respectfully submitted,

MAX M. KORSHAK,
Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,
Corporation Counsel.

DECEMBER 1, 1914.

In Re EXPENSES OF ELECTION CONTEST.

HON. OTTO KERNER, Chairman Committee on Judiciary.

Dear Sir:

Your committee has asked the corporation counsel to give an opinion as to whether a provision requiring the giving of a bond, or the payment of the expenses of a contest, by the person who makes same, in all cases where the election of an alderman is contested, would be valid.

We are of the opinion that any provision of the kind suggested which would make the bringing of a contest expensive or burdensome to the person who initiates same would be contrary to both the letter and the spirit of the statute relating thereto.

It is provided by section 10, Article IV of the Cities and Villages Act that the manner of contesting an election shall be the same, as nearly as may be, as in the case of the election of county officers under the general laws of this State.

Under the general election law it is provided (Secs. 97 and 98), that the Circuit Court shall hear and determine contests of the election of judges of the county court, mayors of cities, presidents of county boards and presidents of villages, and that the County Court shall hear and determine contests of election of all other county, township and precinct officers. In both of these courts in order to begin a contest it is necessary to file a petition or statement, and the usual fee of \$10.00 is required; the sheriff's fee for summoning the person whose office is contested must also be paid. To this extent there is some expense attached to the proceeding, and we presume that if the city council prescribes some reasonable fee

for the contestant, which is analogous to the docket fee in these courts, the provision would be upheld.

It may also be possible to enforce a provision requiring the party who desires to take testimony before one of the officers prescribed by statute, to pay for all expenses in taking down and transcribing the testimony; but when this is done the city council has gone as far as the law will permit in placing burdens on the contestant. The spirit of the election law is manifested throughout the various sections governing contests, as contemplating that a contest shall be stripped of technicalities and made a simple proceeding which can be carried on without great expense.

The legislature has made it a practice to allow attorneys' fees in the case of contests which are decided by that body. The effect of reimbursing members for their expenses in this way has been to increase the number of contests instead of decreasing them; hence, it would probably not be desirable to institute any such plan with reference to contests of aldermanic elections, and in any event it is somewhat doubtful whether any appropriation made for such purpose would be valid.

We, therefore, conclude that if it is the desire of the city council to discourage frivolous contests it may do so by imposing a reasonable fee to be paid to the city clerk at the time of instituting the contest and requiring the parties to the contest to pay their own expenses in taking testimony and transcribing the same.

Yours respectfully,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,
Corporation Counsel.

DECEMBER 1, 1914.

In re SALE OF CIGARS THROUGH THE MEDIUM OF DICE SHAKING.
HON. CARTER H. HARRISON, Mayor.

Dear Sir:

We acknowledge receipt of your communication to this department dated May 29, 1914. With your communication

you transmitted the letter of Attorney Edward H. Morris. His letter describes the scheme of selling cigars through the medium of shaking dice, substantially as follows: The patron of the cigar store pays twenty-five cents and is given a dice box. If the aggregate number of the dice shaking shows twenty-four, then such patron is entitled, at the option of the owner, to a credit for thirty days for cigars twice the amount of his cash purchase or the money paid by him; if the patron does not obtain twenty-four in the dice shaking, he then is entitled to twenty-five cents' worth of merchandise, and in either event the patron is entitled to the value of the money paid; if twenty-four is shaken and if he has availed himself of the right of credit for fifty cents, he must within thirty days pay the amount of his indebtedness.

The statute forbidding lotteries is as follows:

“Setting up of.) §180. Whoever sets up or promotes any lottery for money or by way of lottery disposes of any property of value, real or personal, or under pretense of a sale, gift or delivery of any other property, or any right, privilege or thing whatever, disposes of, or offers or attempts to dispose of any real or personal property with intent to make the disposal of such real or personal property dependent upon or connected with any chance by dice, lot, numbers, game, hazard or other gambling device, whereby such chance or device is made an additional inducement to the disposal or sale of said property, and whoever aids, either by printing or writing, or is in any way concerned in the setting up, managing or drawing of any such lottery, or in such disposal, or offer or attempt to dispose of property by any such chance or device shall, for each offense, be fined not exceeding \$2,000.” Chapter 38, Hurd's Rev. Stat. (Criminal Code.)

As we analyze the above, we find the following clauses forbid the above described scheme:

Whoever by way of lottery disposes of any property, real or personal;

Whoever disposes of any right, privilege or thing whatever;

Or offers to dispose of property with intent to make the disposal of such property dependent upon or connected with

any chance by dice whereby such chance is made an additional inducement to the disposal or sale of said property.

We hold that this is a disposal of personal property of value, which is dependent upon a chance by use of dice. Furthermore, the right of privilege of credit, which is a substantial thing, is dependent on a game of chance; the disposal of the property is with intent to make it dependent upon and connected with a chance, and this chance or device is made an additional inducement to the sale of such property.

We also quote section 980 of The Chicago Code of 1911, which is as follows:

“980. Possession of Gambling Device.) No person shall bring into the city or have in his possession within the city, for the purpose of gaming or gambling for money or other valuable thing, any table or other device of any kind or character whatsoever whereon or with which money or any other valuable thing may in any manner be played or gambled for.

“Any person violating any of the provisions of this section shall be fined not less than twenty-five dollars nor more than two hundred dollars for each offense.”

It cannot be denied that when the shaking of dice is connected with a transaction by which something of value is secured by means of a chance it is a gambling device, and its possession and use is a violation of said section 980.

Therefore, we are of the opinion that the scheme described above is a violation of the statute concerning lotteries, and also that the possession and shaking of the dice in connection therewith causes the dice to be a gambling device, and the possession and use of same in this way is also a violation of the ordinance.

Yours very truly,

M. W. CAGNEY,

Assistant Corporation Counsel.

Approved:

JOHN W. BECKITH,

Corporation Counsel.

DECEMBER 2, 1914.

Re ORDINANCE GIVING CITY TELEPHONE SUPERVISOR ACCESS TO
PLANT AND RECORDS OF TELEPHONE COMPANIES.

HON. LEWIS D. SITTS, Chairman Committee on Gas, Oil and
Electric Light.

Dear Sir:

Your committee has referred to this department draft of a suggested ordinance which was referred to your committee by the city council November 18, 1914, conferring upon city telephone supervisor the right to inspect at any time the plant, equipment, records, etc., of all telephone companies conducting a general telephone business in the City of Chicago, and has requested an opinion regarding the validity of said ordinance and as to the powers of the City in regard to the matters covered by the ordinance.

In the preamble to the suggested ordinance, section 5 of the ordinance creating a telephone bureau, passed May 26, 1913, is quoted as defining the duties of the head of said bureau. Said section 5 was expressly repealed in and by the ordinance establishing a department of public service, passed March 16, 1914. (Council Journal, pp. 4450-4453.) Sections 5 and 6 of said ordinance of March 16, 1914, state the powers and duties of said department of public service. The right sought to be conferred upon the city telephone supervisor by the suggested ordinance is set out in section 1 thereof, which is as follows:

“Section 1. RIGHT OF THE CITY TELEPHONE SUPERVISOR TO INSPECT TELEPHONE PLANTS.) The City Telephone Supervisor shall have the right, either personally or by representative to inspect any and all portions of the plant, equipment, exchanges, tunnels, conduits, system, or records of any and all telephone companies conducting a general telephone business with the City of Chicago at any time that he should deem such an inspection advisable in connection with the fulfillment of his duties as defined by the ordinance passed May 26, 1913, entitled ‘An Ordinance Creating a Telephone Bureau.’ ”

The ordinance granted to the Chicago Telephone Company November 6, 1907, which, together with the supplemental ordinance passed May 26, 1913, are the ordinances under which said company is now operating, provides (section 2)

that the City shall have the right at any time to make a complete examination at the company's offices, of all its records, books, accounts, contracts and vouchers for (among other purposes) any purpose whatsoever connected with the duties or privileges of the City or company under said ordinance. Said company's ordinances make no provision for an examination by the City of the company's plant or equipment.

The ordinances granted to the Illinois Telephone and Telegraph Company provide for certain reports to be made annually by the company to the City and also that the city comptroller or accountants authorized by him, under the direction of the mayor or city council, shall have the right at all reasonable times to examine all the original books, vouchers and records of the receipts and expenditures of the company, or relating to its business or affairs for the purpose of ascertaining the accuracy of the report required, and the rights of the City under the ordinance. The ordinances of this company make no provision for the examination by the City of the company's plant or equipment.

The ordinances under which the Chicago Telephone Company and the Chicago Tunnel Company, through its operating agent the Illinois Telephone and Telegraph Company, are operating their telephone businesses, are contract ordinances and the provisions thereof in respect to the examination by the City of the books and records of the companies were inserted therein as conditions of the granting by the City to the companies of the privilege of using the streets. The provisions of these contract ordinances can only be changed by consent of the parties thereto.

It remains to consider whether the City has the right, as an exercise of its police power, to pass the suggested ordinance or any ordinance conferring upon the city telephone supervisor powers set out in the suggested ordinance.

In the case of *City of Chicago v. Weber*, 246 Ill. 304, our Supreme court uses the following language (p. 307) :

“ * * * the recognized rule is that a municipal corporation possesses and can exercise the following powers and no others: ‘First, those granted in express words; second, those necessary or fairly implied in or incident to the powers expressly granted; third, those essential to the

declared objects and purposes of the corporation—not simply convenient but indispensable. Any fair, reasonable doubt concerning the existence of the power is resolved by the courts against the corporation and the power is denied.”

The police power is vested primarily in the general assembly, and such police power as the city possesses must come to it by virtue of its being delegated to the city by the general assembly.

The general assembly has not conferred unlimited police power upon municipalities. Clause 66 of section 1 of article V of the Cities and Villages Act purports to give the cities and villages the power to “pass and enforce all necessary police ordinances.”

In the case of *City of Chicago v. M. & M. Hotel Co.*, 248 Ill. 264, the Supreme court in commenting on clause 66, said (p. 271) :

“In other words, clause 66 is intended to give cities and villages the power to ‘pass and enforce all police ordinances’ which may be necessary in reference to the subjects and occupations the regulation and control of which are by other specific clauses expressly delegated to such municipalities. That clause is not a general delegation of all police power of the State, which, if given to them, would authorize cities and villages to pass and enforce all police ordinances upon any and all subjects, without regard to any other specific delegation of power.”

The legislature has not seen fit to expressly delegate or give to cities and villages the power to inspect the plant, equipment, exchanges, tunnels, conduits, systems or records of telephone companies conducting a telephone business within the city or village, nor can such power be considered as fairly implied in or incident to any power expressly granted by the legislature to cities. Nor, in our opinion, can it properly be said that the exercise of such power is necessary or pertinent to the protection or preservation of the public health, morals or safety.

We are, therefore, of the opinion that until the legislature sees fit to delegate to cities the powers under consideration, the city is without power to pass the ordinance in question or any ordinance purporting to confer upon the city tele-

phone supervisor the powers set out in the said suggested ordinance.

Yours respectfully,
 BRYAN Y. CRAIG,
First Assistant Corporation Counsel.

Approved:
 JOHN W. BECKWITH,
Corporation Counsel.

DECEMBER 2, 1914.

In re LIMITING TERMS OF RAILROAD GRANTS.

HON. ALBERT J. FISHER, Chairman Committee on Local Industries.

Dear Sir:

In accordance with your verbal request that this department furnish your committee an opinion as to whether the city council is empowered to limit the time within which railroad ordinances are operative, we wish to say that it has been held by our Supreme Court that the consent of property owners may be limited by conditions such as the foregoing and that the city council in the passage of an ordinance requiring such consents preliminary to its action, is bound by the conditions attaching to the consent given.

It follows, that the city council may impose similar conditions in ordinances of this nature coming before it for consideration.

If the railroad company accepts the ordinance with the burdens thus imposed by its terms, it is bound thereby.

Property owners' consents are only necessary in cases where the tracks run along and through a street or alley, but not in cases where the tracks only cross streets or alleys.

In track elevation ordinances, such as the one now before your committee for the Baltimore and Ohio Chicago Terminal Railroad Company, conditions of this kind may be considered onerous by the grantee on account of the large expenditures involved in such undertakings and the permanent character of the elevated roadbed.

So far as this department knows, no such conditions have ever been attached to any track elevation ordinance. All that has been found necessary is to require any strip of land used

for street purposes and vacated and closed because of the new **improvement, to be dedicated by the company** whenever the city determines to open the strip thus closed, for public use.

However, this is not so much a matter of law as it is ground for negotiation between the city authorities and the railroad company whose tracks are to be elevated.

Your committee also desires to know as to whether the railroad company may change its location, or enlarge its right of way.

This right is statutory and when exercised does not preclude the company from changing its location, grade and crossings, or enlarging its right of way. The mere existence of a power of the city council "to change the location, grade and crossings of railroads," until exercised is no limitation upon the power of a railroad company to select its route and locate its road within the city.

Chicago & Western Indiana R. R. Co. v. Dunbar et al.,
100 Ill. 110.

In the present case the company is ordered to change its route at a given point to a point north selected by it. If the new route runs over private property, the company must acquire the property needed either by purchase, lease or condemnation.

Very truly yours,
NICHOLAS MICHELS,
Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,
Corporation Counsel.

DECEMBER 2, 1914.

In re WAR REVENUE STAMP ACT.

HON. FRANCIS D. CONNERY, City Clerk.

Dear Sir:

Your request for advice concerning the application of the provisions of the new revenue law to the work of your office, particularly with reference to certificates attached to copies of ordinances and records certified under the seal of the city, notary certificates and bonds filed under ordinances and licenses, was received today and in reply we call your attention

to certain provisions in the War Revenue Act which relate to the subject of your inquiry and are as follows:

"Sec. 15. That all bonds, debentures, or certificates of indebtedness issued by the officers of the United States Government, or by the officers of any state, county, town, municipal corporation, or other corporation exercising the taxing power, shall be, and hereby are, exempt from the stamp taxes required by this Act: *Provided*, That it is the intent hereby to exempt from the stamp taxes imposed by this Act such state, county, town, or other municipal corporations in the exercise only of functions strictly belonging to them in their ordinary governmental, taxing or municipal capacity: *Provided further*, That stock and bonds issued by co-operative building and loan associations, mutual ditch or irrigating companies, and building and loan associations or companies that make loans only to their shareholders, shall be exempt from the tax herein provided."

SCHEDULE A.

* * *

"Bond. For indemnifying any person or persons, firm or corporation who shall have become bound or engaged as surety for the payment of any sum of money, or for the due execution or performance of the duties of any office or position, and to account for money received by virtue thereof, and all other bonds of any description, except such as may be required in legal proceedings, not otherwise provided for in this schedule, 50 cents.

"Certificate of any description required by law not otherwise specified in this Act, 10 cents."

The above quoted provisions are substantially similar to those contained in the War Revenue Act of June 13, 1898.

The Supreme Court in the case of *Ambrozinni v. United States*, 187 U. S. 1, held that bonds required by the City of Chicago of applicants for licenses for the keeping of dram-shops were not required to be stamped. The court on page 8 said:

"* * * but, as the bonds were required by the state and city and were issued for the benefit of the public and not for the benefit of the individual who executed them, it appears to us that they came fairly within the meaning of the clause (referring to the exemption clause in the 1898 Act similar to Section 15 above quoted), assuming that they were covered by Schedule A."

In view of this construction we are of the opinion that bonds

filed in your office by applicants for various classes of licenses need not be stamped under the present revenue law.

The meaning of the proviso contained in Section 15 is not altogether clear, although the commissioner of internal revenue in his decisions under the Act of 1898 indicated that municipal corporations only were exempt from the provisions of the Revenue Act in the exercise of governmental as distinguished from private functions; and this construction to some extent was recognized in the case of *Warwick v. Bettman*, 102 Fed. Rep. 127, in which the court at page 128 said:

“A state may, in its corporate, as distinguished from its sovereign capacity, exercise functions not strictly governmental and these would not come within the operation of the exemption clause of the War Revenue Act just quoted.”

Assuming the correctness of this interpretation, bonds running to the city to indemnify it against loss on account of undertakings in connection with the exercise of strictly private functions would be required to be stamped under the Revenue Act.

Bonds filed under ordinances granting private privileges for the most part are required in the exercise of governmental functions but we deem it advisable to require all such bonds to be stamped until this matter is finally decided by the internal revenue commissioner. The amount of the stamp to be affixed to such bonds if executed by surety companies must be equal to one-half of 1 per cent. of the premium paid on such bond and it will be necessary for you to require the surety companies to state by affidavit the amount of the premium charged. Where the surety or sureties on bonds are individuals the amount of the stamp required is 50 cents. Each certificate, attached to any bond subject to tax, showing the authority of the person or persons before whom the instrument is attested requires, under the Revenue Act, a stamp of 10 cents. Certificates issued by you and attached to copies of ordinances and records certified under the seal of the city each require a 10 cent stamp, provided the same are issued for the sole benefit of the individuals applying for the same. In the case of such certificates the stamp should be affixed by you

and your initials, together with the date of the affixing, should be written or stamped upon such stamp.

We are preparing a list of various documents executed by or filed with the city which we purpose to transmit to the internal revenue commissioner for definite rulings as to the application of the Revenue Act to the same and upon receiving decisions we shall advise you in the event there is any conflict with our opinion expressed in this letter.

Yours very truly,

LORING R. HOOVER,
Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,
Corporation Counsel.

DECEMBER 3, 1914.

In re CERTIFICATION OF CHICAGO RYS. 'CO. BONDS BY CITY
COMPTROLLER.

HON. JOHN E. TRAEGER, City Comptroller.

Dear Sir:

Replying to your inquiry of November 28 relative to the certification by you of the bonds of the Chicago Railways Company under section 7 of the ordinance of February 11, 1907, we advise you that if the report of the auditors on the books of the company should show that charges had been made to capital which should not have been made, and that based on these charges which should not have been made, bonds have been issued, it will be necessary to either bring about the cancelation of any bonds issued in excess of those authorized by the ordinance or else to add to capital account expenditures under the terms of the ordinance sufficient to offset those erroneously made without any bonds being issued or certified by reason of such expenditures, and if the latter method were adopted, you would, of course, cease to certify bonds until the overcharge to capital account—if any is shown by the auditors' report—is replaced by expenditures which, under the terms of the ordinance, are chargeable to capital.

Replying to your second inquiry as to the completeness and validity of certificates which bear the signatures of two of the three members of the board, we advise you that section

36 of the Railways Company ordinance of February 11, 1907, expressly provides that:

“A majority of said Board of Supervising Engineers shall at all times be authorized to exercise the powers conferred by this ordinance on said board.”

In view of this provision of the ordinance, we deem the signatures of any two members of the board quite sufficient to validate a certificate.

Yours very truly,

CHARLES M. HAFT,
Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,
Corporation Counsel.

DECEMBER 3, 1914.

In re ORDINANCE REQUIRING REPORT OF BIRTHS TO THE COM-
MISSIONER OF HEALTH WITHIN TWENTY-FOUR HOURS
AFTER THEIR OCCURRENCE.

HON. G. B. YOUNG, Commissioner of Health.

Dear Sir:

We have your communication of the 23d ult., addressed to the corporation counsel relative to the passage of an ordinance by the city council requiring births to be reported to the Health Department within twenty-four hours after their occurrence in view of the State law requiring a report of births within thirty days after their occurrence to the county clerk provided “that in cities of fifty thousand or more inhabitants, reports may be made to the city commissioner of health instead of the county clerk, if said commissioner of health so requests.”

In conformity with the opinion in the case which you mention, *City of Chicago v. Union Ice Cream Company*, 252 Ill. 311, and also *McPherson v. Village of Chebanse*, 114 Ill. 46, and *City of Clinton v. Wilson*, 257 Ill. 581, we believe that such an ordinance would not be repugnant to nor in conflict, but in harmony with the State law. And if the time limitation, twenty-four hours, be reasonable, we think the ordinance would be valid.

We have prepared a tentative draft of an amendment to the Code as requested, which is herewith enclosed.

Yours very truly,

GEORGE B. O'REILLY,

Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,

Corporation Counsel.

DECEMBER 4, 1914.

In re JURISDICTION OF HARBOR POLICE.

HON. L. E. MCGANN, Commissioner of Public Works.

Dear Sir:

Under date of November 16, 1914, you request an opinion from the Law Department on the jurisdiction of the harbor police along the lake shore and desire to know whether you should discontinue the harbor police service along the portions controlled by the park boards, and whether Section 1097 of the Municipal Code, defining the harbor of the City of Chicago, should not be altered to take care of conditions referred to in your letter, to-wit: the fact that certain park boards have jurisdiction over portions of the lake front.

The foregoing matters have been referred to the undersigned for reply, and in answer thereto I beg to state as follows:

The Legislature of the State has full power and authority to create municipal corporations, such as the park boards above referred to, and within the scope of the powers granted such park boards have exclusive authority within and over their respective park districts and the city has no like concurrent authority within these areas. The jurisdiction of the park districts extends only over the submerged lands to such an extent as they are authorized by law to fill in and reclaim the submerged shallows or are given by the respective acts of the Legislature special police powers over submerged lands. An example of the police power referred to may be found in the jurisdiction conferred upon the Lincoln Park Commissioners by the Act of June 4, 1889, extending such police

power two hundred and fifty feet beyond the breakwater protecting Lake Shore Drive, but beyond the limits of the submerged areas that they are authorized to fill in and beyond the expressed limits of their police power they have no further jurisdiction.

By Section 1097 of the Municipal Code the City of Chicago has harbor jurisdiction extending three miles beyond the shore line, and by Section 14 of the Harbor Act of June 23, 1913, the City of Chicago has

“the right, power and authority * * * to cross by roadways or other appropriate approaches, wharves, docks, levees, breakwaters, retaining walls, lands and submerged lands, or any of them, of any municipal corporation (other than a city or village), whenever any such crossing shall by ordinance of such city or village be declared necessary, appropriate, convenient, useful, desirable or advantageous to harbor development and use or the development and use of any of the utilities mentioned in this act.”

From the foregoing it is clear that the city could build a harbor opposite and beyond any of the park areas, whether of upland or submerged land, and for that reason I do not believe that Section 1097 of the Municipal Code should be altered but that it is in proper form as it now is.

As to the jurisdiction of the harbor police along the portions of the lake front controlled by the park boards, it is quite clear that they have no jurisdiction within the areas controlled by these boards as far out as park jurisdiction extends, but beyond that limit and out to the three-mile limit the harbor police still have jurisdiction.

As to whether your department should discontinue the harbor police service is a question of policy which this department cannot properly determine but which I think you will be able to determine from the definition of the jurisdiction of the city and the respective park boards as above set forth.

Respectfully submitted,
JAMES. G SKINNER,
Assistant Corporation Counsel.

Approved:
JOHN W. BECKWITH,
Corporation Counsel.

DECEMBER 4, 1914.

In re CONTINUANCE OF UNLIMITED \$125 PER ANNUM BUSINESS SERVICE.

HON. MONTAGUE FERRY, Commissioner of Public Service.

Dear Sir:

In reply to your recent request for an opinion as to whether or not the changing of a firm name prevents the new firm from continuing to receive unlimited service at the \$125 per year rate under the Chicago Telephone ordinances, we beg to advise you that in our opinion such a change, so long as a part or any of the individuals constituting the old firm remain in the new one, does not make a new subscriber and such new firm is entitled to continued service of the same class as furnished the old firm.

In arriving at this conclusion we consider that the term subscriber as used in paragraph (c) of Section 2 of the Chicago Telephone ordinance passed May 26, 1913, applies to the members of firms in such a way that the firm's artificial name, although changed, must be listed in the telephone directory and applies to the firm, as distinguished from the members thereof, in such a way that the addition of new members thereto does not constitute a different subscriber.

Yours very truly,

LORING R. HOOVER,
Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,
Corporation Counsel.

DECEMBER 7, 1914.

In re WITHDRAWAL OF FRONTAGE CONSENTS FOR GARAGE.

HON. HENRY ERICSSON, Commissioner of Buildings.

Dear Sir:

You referred to this department for our consideration a letter of the superintendent of maps and a number of affidavits relating to the petition for the location of a garage at 1334 South Spaulding avenue.

It appears on or about November 23, 1914, the map department to which was referred the petition of property owners concerning the said garage, reported that more than

a majority of the frontage involved was represented by signers who had assented to the location of said garage at the place in question. Since then, however, there were presented six affidavits under date of December 4, 1914, in which some of the original signers declared that they had understood at the time they signed the petition that the garage to be erected was to be a small one and was to contain no more than three automobiles, and that the same was to be for the private use of the owner of the premises and a tenant residing therein. It is therefore charged by the persons making the affidavits that their consents were obtained through a misrepresentation of the purpose and intention of the owner who is now constructing a garage under a permit secured by virtue of the said petition.

Nothing appears in the affidavits which indicates that the petition was invalid, informal or otherwise defective at the time it was presented to the Commissioner of Buildings. If the affidavits were such as to indicate that there were not sufficient signatures at the start, or that some of the signatures were forgeries, or that the persons representing themselves as the owners of property were not in fact the owners, there would be ground for revoking the permit issued thereunder. But in the absence of any such showing, and in view of the fact that the parties who now seek to withdraw their consents only claim that they were mistaken or had been misinformed as to the size of the garage to be erected, you would be placing yourself in the attitude of a judicial officer if you undertook to adjust this matter.

There is no provision of the city ordinances which requires frontage consents for a building in which the owner would house only his private machine and allow his tenant living on the same premises to place his machine, if the use of the building is confined to such purpose.

A garage, as defined by the city ordinances for which frontage consents must be secured in residential districts, is one where automobiles are kept or let for hire or reward or kept ready for use and where rent is paid for such keeping. While it may be true that the parties who now seek to withdraw their signatures were not fully advised as to this, nev-

ertheless, they having consented to the construction of a garage without limitation of any kind and having failed to withdraw such consent until after the permit was issued and work begun on same, have no redress so far as the Commissioner of Buildings is concerned. The permit having been issued and the work having been begun thereunder, the rights of the owner of same are vested, so far as the city or any of its officers are concerned. We therefore beg to advise you that it would not be proper for you to revoke the permit, and the objecting parties, if they have any rights in the premises, should have same adjudicated by a court of competent jurisdiction.

We herewith return the letter of the superintendent of maps and the six affidavits forwarded to us.

Yours respectfully,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,

Corporation Counsel.

DECEMBER 8, 1914.

In re WAR REVENUE STAMP ACT.

HON. MICHAEL ZIMMER, City Comptroller.

Dear Sir:

The request of Hon. John E. Traeger, Comptroller, of the 4th inst., relative to the effect of the new War Revenue Act so far as certain transactions in your office are concerned, has been referred to me for reply.

In our opinion, stamps must be affixed to all powers of attorney, as provided by the following paragraphs contained in Schedule A of the Internal Revenue Act:

“Power of attorney or proxy for voting at any election for officers of any incorporated company or association, except religious, charitable or literary societies, or public cemeteries, 10 cents.

“Power of attorney to sell and convey real estate, or to rent or lease the same, to receive or collect rent, to sell or transfer any stock, bonds, scrip, or for the collection of any dividends or interest thereon, or to perform any and all other acts not hereinbefore specified, 25 cents:

Provided, That no stamps shall be required upon any papers necessary to be used for the collection of claims from the United States for pensions, back pay, bounty, or for property lost in the military or naval service."

Stamps need not be affixed to proposals for payment of interest on city deposits, indemnity bonds, acknowledgments and notary certificates filed therewith. Stamps need not be affixed to city contracts nor to bonds filed with contracts relating to the exercise of governmental, as distinguished from private functions, but we deem it advisable to require stamps to be affixed to bonds accompanying said contracts until a decision can be obtained from the treasury department on this question.

Deeds conveying realty for a consideration or of a value, exclusive of incumbrance thereon, exceeding \$100 but less than \$500, require a 50 cent stamp and each additional \$500 or fractional part thereof requires an additional 50 cent stamp, whenever the property is sold or purchased by the city in its private capacity, as distinguished from its governmental capacity.

Certificates required by law and executed by your department for the sole benefit of private individuals require the affixing of a 10 cent stamp. All stamps affixed by your department should be initialed and contain the date of the affixing which should be written or stamped thereon. The cost of such stamps may be charged the party seeking the certificate.

We are preparing a list of various documents executed by or filed with the city which we purpose to transmit to the internal revenue commissioner for definite rulings as to application of the revenue act to the same and upon receiving a decision we shall advise you in the event there is any conflict with our opinion expressed in this letter.

Very truly yours,

LORING R. HOOVER,
Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,
Corporation Counsel.

DECEMBER 8, 1914.

In re FILLED IN LAND OF THE AMERICAN SMELTING & REFINING COMPANY.

TO THE HONORABLE, THE CITY COUNCIL OF THE CITY OF CHICAGO.

Gentlemen:

By order passed by your honorable body November 18, 1914, the corporation counsel is "directed to investigate what rights the American Smelting & Refining Company (located in South Chicago) acquired under an act of the General Assembly by which certain submerged shore lands of Lake Michigan were transferred to said company to be filled in, and to report his findings to your council at an early date."

The rights of said company will be more clearly understood if the act of the General Assembly, conferring the same, is set out at large. Accordingly, the same is quoted in full as follows:

"An Act for the sale to American Smelting & Refining Company of the interest of the State of Illinois in certain lands," approved June 15, 1909, in force July 1, 1909.

"Section 1. *Be it enacted by the People of the State of Illinois represented in the General Assembly:* That the right, title and interest of the State of Illinois in and to the land now and heretofore submerged beneath the waters of Lake Michigan, and described as follows, shall be granted, quit-claimed and conveyed to American Smelting & Refining Company, in fee, that is to say: Beginning at a point in the northeasterly face of breakwater on the northeasterly line of dock one (1) in Calumet and Chicago Canal & Dock Company's subdivision of part of the northwest fractional quarter of fractional Section Five (5), Township Thirty-seven (37) North, Range Fifteen (15) East of the Third Principal Meridian (3rd P. M.), Cook County, Illinois, and south of Indian boundary line, where the southeasterly face of shore return pier extended intersects the northeasterly face of said breakwater; thence northeasterly on a line parallel to the northwesterly face of United States south pier on the southeasterly side of the Calumet River, which line is north sixty (60) degrees, thirty-one (31) minutes and thirty (30) seconds east a distance of nineteen hundred and ninety-two and forty-four hundredths (1,992.44)

feet, more or less, to the United States harbor line; thence south twenty-three (23) degrees five (5) minutes and thirty (30) seconds east along the United States harbor line a distance of three hundred fifty-two and sixteen hundredths (352.16) feet, more or less, to a point in a line parallel to and three hundred and fifty (350) feet southeasterly from the first mentioned parallel line; thence south sixty (60) degrees, thirty-one (31) minutes and thirty (30) seconds west along said parallel line a distance of nineteen hundred and thirty-five and forty-three hundredths (1,935.43) feet to a point where a line parallel to and three hundred and fifty (350) feet southeasterly from the southeasterly face of the shore return pier above mentioned intersects said parallel line; thence southwesterly on a line parallel to the southeasterly face of said shore return pier one hundred and thirty (130) feet, more or less, to a point in the shore line of Lake Michigan as per United States survey of 1869; thence northwesterly along said shore line three hundred and fifty (350) feet to the southeasterly face of shore return pier above mentioned; thence northeasterly along the southeasterly face of said shore return pier one hundred and forty (140) feet, more or less, to the place of beginning, containing sixteen and seventy-five hundredths (16.75) acres, subject, however, to all rights and interests of the government of the United States, and upon the following conditions:

“First—That the said American Smelting & Refining Company shall pay into the treasury of the State of Illinois, within sixty days from the passage of this Act, the sum of sixteen hundred and seventy-five dollars (\$1,675.00).

“Second—That not less than five (5) acres of the land aforesaid shall be conveyed at any one time, and that any such part of such lands shall not be so conveyed until the same, not less than five (5) acres in area, shall have been filled in, and reclaimed, and raised above the surface of Lake Michigan.

“Third—That any part of such land which shall not have been filled in, and reclaimed, and raised above the surface of Lake Michigan, within *fifteen* (15) years from the date of this Act shall go into effect, shall revert to the State and the said American Smelting & Refining Company shall have no further right by virtue hereof to fill in and reclaim such part.

“Fourth—That said American Smelting & Refining Company shall have free and unobstructed access from

such of said lands as may be filled in and reclaimed, as aforesaid, throughout their entire shore frontage, to Lake Michigan, but shall not have any other riparian rights appurtenant thereto.

“§ 2. Upon payment being made as above provided, and upon the filing in the office of the Secretary of State, from time to time, of good and sufficient evidence that any part of such lands not less than five (5) acres in area has been filled in, and reclaimed, as aforesaid, then a patent shall be issued under the great seal of State, by the Governor and Secretary of State, conveying such part of said lands, but not less than five (5) acres at any one time, to the said American Smelting & Refining Company, in accordance with the provisions of this Act.”

Your honorable body has expressed its policy in regard to the foregoing subject matter by a resolution passed July 22, 1912 (see Council Journal of that date, pp. 1441-2) as follows:

“WHEREAS, The General Assembly of the State of Illinois in 1909 passed three certain acts granting certain lands to certain corporations which said acts are entitled: ‘An Act providing for the sale to the Illinois Steel Company of the interest of the State of Illinois in certain lands.’ ‘An act for the sale to the Iroquois Iron Company of the interest of the State of Illinois to certain lands,’ and ‘An Act for the sale to American Smelting & Refining Company of the interest of the State of Illinois in certain lands,’ which said several acts were approved June 15, 1909, and,

“WHEREAS, The said Illinois Steel Company, the Iroquois Iron Company and the American Smelting & Refining Company have paid the several considerations to the State of Illinois provided in said acts; and,

“WHEREAS, Permits were issued in the month of June, 1910, by the City of Chicago to said Illinois Steel Company and Iroquois Iron Company to construct docks or breakwaters on the outer or water boundary lines of the tracts in said acts granted; and,

“WHEREAS, The said Illinois Steel Company has enclosed a portion of the said lands to it granted by docks or breakwaters and the said Iroquois Iron Company has enclosed the tract in said second act above described, by docks or breakwaters; and,

“WHEREAS, An ordinance has been prepared at the request of the Committee on Harbors, Wharves and Bridges of the City Council of the City of Chicago, to

create a Harbor District, to be known as Harbor District No. 5 in the waters of Lake Michigan, to the east and north of the plants owned and operated by the said Illinois Steel Company, Iroquois Iron Company and American Smelting & Refining Company; and,

“WHEREAS, Said Harbor Ordinance was on July 19, 1912, by said committee ordered placed on file; and,

“WHEREAS, Said American Smelting and Refining Company has made application to the City of Chicago for a permit to build a bulkhead or breakwater on northeasterly and southeasterly boundaries of the tract or premises in said third act above described; and,

“WHEREAS, Said permit has heretofore been refused and withheld pending the disposition of the said Harbor Ordinance which has been placed on file as aforesaid; and,

“WHEREAS, The City Council of the City of Chicago recognizes that the growth and prosperity of that portion of the City of Chicago, known as South Chicago, largely depends upon the future development and expansion of the leading industries there located, conspicuous among which are the said Illinois Steel Company, the Iroquois Iron Company and American Smelting & Refining Company; and,

“WHEREAS, The City Council of the City of Chicago is desirous of treating all of said corporations fairly and alike and as a matter of public policy does not desire to question the legality of the aforesaid grants to the said corporations by said General Assembly of the State of Illinois; it is, therefore,

“ORDERED, That the Commissioner of Public Works be and he is hereby directed to issue to American Smelting & Refining Company, a permit to enclose by bulkheads or breakwaters on the northeasterly and southeasterly boundaries of the said tract of land in the aforesaid third act of the General Assembly of the State of Illinois above mentioned, on the following lines:

“‘Beginning on the U. S. harbor line at the southeast corner of bulkhead, built by the Iroquois Iron Company opposite Dock one (1) in Calumet and Chicago Canal and Dock Company’s subdivision of part of the northwest fractional quarter of fractional Section 5, Township 37 North, Range 15, East of the 3rd Principal Meridian and south of the Indian boundary line, thence south twenty-three (23) degrees, five (5) minutes and thirty (30) seconds East along the United States Harbor line 352.16 feet to a point, thence south sixty (60) de-

grees, thirty-one (31) minutes and thirty (30) seconds west 1935.43 feet to the end of existing breakwater, thence southwest parallel with the line of existing shore return pier, 130 feet more or less to the present shore line. Said shore return pier lies along the southerly margin of said Dock one (1).'

Subject, however, to all rights, interests and requirements of the Government of the United States, and further subject to all the conditions in said act contained, entitled: 'An act for the sale to American Smelting & Refining Company of the interest of the State of Illinois in certain lands,' approved June 15, 1909.'

From the foregoing resolution it appears that the price of said submerged lands as fixed by the General Assembly was paid by the company, and the commissioner of public works was directed to issue a permit to enclose by bulkhead or breakwater the said tract of land on the northeasterly or southeasterly boundary. Under the terms of the act any part of said land that is not filled in, or reclaimed, within fifteen (15) years shall revert to the State. Of this period more than nine (9) years remain in which the company may complete the reclamation.

When this matter was under consideration before the committee on harbors, wharves and bridges, July 16, 1912, the corporation counsel tendered to said committee an opinion questioning the validity of the three (3) grants referred to in the above resolution. This tender, however, was not accepted by the committee, and it recommended the passage of said resolution.

In view of the matters set forth in the resolution, this department does not deem it advisable to render an opinion in regard to the validity of said grants, unless your honorable body should, by resolution or otherwise, reverse or abandon its policy as set forth in the resolution of July 22, 1912.

Respectfully submitted,

JAMES G. SKINNER,
Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,
Corporation Counsel.

DECEMBER 8, 1914.

In re REQUIREMENT OF TRACTION COMPANIES TO COMPLY WITH
SERVICE REGULATIONS WITHOUT APPROVAL OF SUCH
REGULATIONS BY BOARD OF SUPERVISING ENGINEERS.

HON. EUGENE BLOCK, Chairman, Committee on Local Transportation.

Dear Sir:

In your letter of December 3, 1914, addressed to this department, you request an opinion on the construction of Sections 10 of the ordinances of February 11, 1907, which relate to service regulations. You desire to be informed whether the city cannot pass a binding service order in the face of a report of the board of supervising engineers that the particular requirement is unreasonable. Replying thereto, we have to say:

Section 10 of the ordinances of the Chicago Railways Company and the Chicago City Railway Company, respectively, provide as follows:

“Section 10. The Company hereby agrees to comply with all reasonable regulations of the service of the said street railway system which may be prescribed from time to time by the City Council of said City and that the approval of any such regulation by the Board of Supervising Engineers shall be binding upon the Company (but not upon the City), as to the reasonableness thereof.”

You will observe under the foregoing section that each of the companies has agreed (1) “to comply with all reasonable regulations of the service of the said street railway system which may be prescribed from time to time by the City Council of said City”; and (2) “that the approval of any such regulation by the Board of Supervising Engineers shall be binding upon the Company (but not upon the City) as to the reasonableness thereof.”

There is no doubt that under the first provision the company is obligated to comply with all reasonable regulations that may be imposed by the City. The company, in express terms, agrees “to comply with all reasonable regulations of the service of the said street railway system which may be prescribed from time to time by the City Council of said City.”

The question arises whether the second provision operates

to prevent the City from passing a binding service order in the face of a report of the board of supervising engineers that the requirement is unreasonable.

You will observe that the second provision does not state that a service regulation shall not have any binding force in case the board holds that the service regulation is unreasonable, nor does the provision make it mandatory upon the City to secure the approval of the board before a service order can have any binding effect upon the company. Under the second provision, the company has expressly agreed "that the approval of any such regulation by the Board of Supervising Engineers shall be binding upon the company (but not upon the City), as to the reasonableness thereof."

We do not believe that this provision can be construed as requiring the City to secure the approval of the board as to the reasonableness of a service regulation before such regulation can have any binding force. The reasonable construction of this provision is that in case the City should secure the approval of the board as to the reasonableness of the regulation (not that the City is required to do so), then and in such event such finding by the board that the regulation is reasonable is conclusive upon the company and the company will be precluded from raising the question that the regulation is unreasonable.

Answering your questions specifically, we are of the opinion that the City has the power to pass a binding service order in the face of a report of the board of supervising engineers that the requirement is unreasonable.

We do not desire to be understood, however, as holding that the company in such a case is precluded from raising the question in litigation—that might arise from failure of the company to comply with such regulation—that the regulation is unreasonable.

In case the City should pass a service regulation in the face of an adverse report by the board of supervising engineers, and the City attempts to enforce such regulation, the

company would have the right to defend on the ground that the regulation is unreasonable.

Very truly yours,

MAX M. KORSHAK,
Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,
Corporation Counsel.

DECEMBER 9, 1914.

In re PROPOSED ORDINANCE PROVIDING FOR THE TESTING, INSPECTION, SELLING AND ADJUSTMENT OF CONSUMERS' ELECTRIC METERS.

HON. MONTAGUE FERRY, Commissioner of Public Service.

Dear Sir:

We have your letter of the 25th ult., in regard to the above entitled matter, together with the draft of a proposed ordinance attached thereto. In this letter you ask two questions. A conversation had with Mr. Wilcox of your office has enabled us to understand more definitely the questions as to which you wish to be advised.

As we understand it the subject naturally divides itself into, and may most conveniently be considered under two headings, namely: firstly, as regards private concerns (so-called) which only supply electricity to the tenants in a particular building or in a particular block, and which do not need and do not have any franchise to use the streets. These are hereinafter referred to as private sellers of electricity or more briefly as private sellers. And, secondly, those corporations which sell electricity to the public generally in the City of Chicago, and which have franchises from the city allowing them to use the streets for the purpose of distributing their utility. This class is hereinafter referred to as public sellers of electricity or more briefly public sellers. As we understand it the Commonwealth Edison Company is the only representative of this class at present existing within the city limits of the City of Chicago.

As regards these two classes, we undersand you to ask the following questions:

1. Has the Public Utilities Commission Law (assuming

it to be constitutional) taken away from the City Council and transferred to the Commission the power to do the things which you seek to do by this ordinance, as regards private sellers of electricity.

2. Same question as regards public sellers of electricity.

3. If the Public Service Commission Law has not taken away from the City Council the power to do the things which you propose to do by this ordinance, as regards private sellers of electricity, has the Council, under the Weights and Measures Statute, or under the Act giving the Council the power to fix rates for sellers of electricity, etc., or under the general powers as to weights and measures given by the Cities and Villages Act, the power to do in regard to private sellers the things which you propose to do in this ordinance?

4. Same question as to public sellers of electricity.

5. Finally, if we decide that the Council has the jurisdiction to do these things as to either or both classes of sellers, you ask us to suggest such amendments in the form of the ordinance as we may deem to be advisable.

1. As regards to the first questions, the term "Public Utility" is defined in Section 10 of the P. U. C. Law as including every corporation, etc., that now or hereafter may own, control, etc., for public use any plant, etc., to be used in connection with the supplying of various kinds of public utilities specified in the definition and including heat, light and electricity.

It obviously follows from this definition that sellers of electricity of the class dealt with in the first question are not affected by the P. U. C. Law at all, unless they can be said to be operating their plants for a public use.

In view of two very recent decisions of the Supreme Court of the United States it is not very easy to say with confidence that the supplying of any commodity, which may be made the subject of a public use, or which may become a public utility, ceases to be a public use merely because of the private character of the corporation supplying it or of the limited number of its customers.

In the case of *German Alliance Insurance Company v. Kansas*, 233 U. S. 389 (decided last April), the Supreme

Court of the United States surprised the legal profession by deciding that the business of a private corporation organized for the doing of a fire insurance business in the usual way, was so far affected by a public use or a public interest as to subject it to have the rates of its premium charges fixed by a statute of the State of Kansas. There was an exceptionally strong dissenting opinion by Justice Lamar in which the Chief Justice and Justice Van Devanter concurred. The questions of what is such a public interest as to justify regulations, and what is such a public use as to justify the fixing of rates, are very fully discussed in the majority opinion and the dissenting opinion in this case.

In the case of *Union Lime Company v. C. & N. W. Ry. Co.*, 233 U. S. 211 (also decided in April last), the court had occasion to consider whether a spur track or switch track, built to accommodate a private business, was a public use so as to authorize an exercise of the power of eminent domain; and the court held that it was. The opinion in this case also discusses the question of what is a public use.

It will be noted that the definition above in part quoted from the P. U. C. Law specifies corporation, etc., furnishing light and electricity, and says in effect that these shall only be public utilities when they furnish the utilities specified for a public use.

This seems to imply that there may be such things as corporations furnishing these utilities for a private use. And certainly, if there may be such things at all, it would seem that corporations which only sell to the tenants of a particular building, and whose plant is so limited that they can only sell to such tenants, are to be regarded as operating for a private use and not for a public use.

Upon the whole, we advise you that private sellers of electricity as above defined are not affected by the P. U. C. statute at all; and we therefore answer the first of the four questions above stated in the negative.

2. As regards the second question, there can be no question but that the Commonwealth Edison Company is affected by and comes under the operation of the P. U. C. Law, if constitutional. It seems to us very clear that Section 54 of this law is broad enough to transfer to the commission full and

complete jurisdiction over the matters which you propose to deal with in this ordinance. This being so, we must assume for the purpose of this opinion that the commission had, under the statute, full authority to act in this matter. And it has acted. By certain rules which were made on the 24th day of September, 1914, and which went into effect on the 1st day of November, 1914, it has occupied this field of jurisdiction. It is, therefore, unnecessary to consider certain decisions rendered in some of the states having public utilities commissions, which hold that, in certain classes of matters, the City Council may exercise concurrent jurisdiction, until the commission had acted and occupied the field.

We, therefore, answer the second question in the affirmative.

3. As regards the third question. The Weights and Measures Act does not confer any powers of this character on a city council. The Act of 1905 is general enough in its terms to include corporations of any kind furnishing the specified utilities. It empowers the city council "to prescribe by ordinance maximum rates and charges for the supply of gas and electricity for power, heating and lighting furnished by any individual, company or corporation to such city and the inhabitants thereof." There is no limitation here limiting the power to fix rates to companies furnishing the specified utility for a public use. This, we understand, was one of the grounds relied on by the Public Utility Companies for holding this statute unconstitutional and void. Certainly, if, and in so far as, it does attempt to give the power to fix rates for companies or individuals engaged in a private business, not affected with a public use, it would be void.

For these reasons we do not think that this statute can be regarded as impliedly giving to the City Council power to do the things sought to be done by the proposed ordinance in respect to private sellers of electricity.

It remains to see if the Council has the powers contended for as regards private sellers, under the general powers as to weights and measures given by the Cities and Villages Act. These general powers include the following:

54. To regulate the inspection, weighing and meas-

uring of brick, lumber, firewood, coal, hay and any article of merchandise.

55. To provide for the inspection and sealing of weights and measures.

56. To enforce the keeping and use of proper weights and measures by vendors.

Under these powers the city has passed an ordinance as to weights and measures which is Chapter LXXXV of the Code of 1911, and which provides for the inspecting and testing of weighing and measuring instruments. The power of the Council to pass this ordinance has never been questioned so far as we know.

We are of the opinion that under the grant of power lastly above referred to the City Council has power to provide for the inspecting and testing of instruments used for the measuring of electricity sold by private sellers.

We therefore answer the third question above stated in the affirmative.

4. Having answered the second question by saying that jurisdiction over the matter of testing the instruments for measuring electrical power for purposes of sale by public sellers has been transferred to the Public Utilities Commission by the P. U. C. statute (assuming this statute to be constitutional), it is unnecessary to further answer the fourth question. The transfer, if valid, would of course include jurisdiction from whatever statutory source derived.

5. The ordinance, as drawn, would require to be modified in several respects, even if the City Council had power to do all the things which it proposes to do. But, before proceeding to settle the form of the ordinance, we would desire to know whether you care to have an ordinance doing only the things which, assuming the soundness of the foregoing opinion, the Council has power to do in this matter.

We understand that the Commonwealth Edison Company is willing to accept and comply with the provisions of the ordinance as to complaint tests, although denying the right of the Council to make any such requirements. Except as to these provisions, public sellers of electricity, subject to the jurisdiction of the commission, would have to be entirely excluded from the operation of the ordinance.

Do you desire such an ordinance?

Yours respectfully,

WILLIAM DILLON,
Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,
Corporation Counsel.

DECEMBER 11, 1914.

In re POWER OF CITY TO COMPEL TRACTION COMPANIES TO
CONSTRUCT COMPULSORY EXTENSIONS.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

In your letter dated December 1, 1914, to this department, you desire to be advised on the following points:

1. Has the City the power, under the terms of the 1907 ordinances, to compel the traction companies to comply with the orders of the City Council to construct new trackage up to the amount provided for under the compulsory extension provisions of the 1907 ordinances?

2. Does the failure of the companies to comply with the orders of the City Council subject the companies to an attack upon their franchises?

With regard to the first question, there is no question as to the obligation of the Chicago Railways Company, the Chicago City Railway Company and the Calumet & South Chicago Railway Company to construct, upon the order of the City Council, during each calendar year, the mileage of extensions provided for in the ordinances of February 11, 1907, and March 30, 1908.

If the companies or any of them fail to comply with their ordinance obligations, in regard to the construction of compulsory extensions they can be compelled to live up to their ordinance obligations by mandamus.

People v. Suburban Railroad Company, 178 Ill. 594.

A mandamus suit may be instituted by a citizen, since the courts have held that when the object of the writ is the enforcement of a public right the people are regarded as the real party and the relator need not show that he has any legal in-

terest in the result. It is enough that he is interested as a citizen in having the law executed and the right in question enforced.

People v. Suburban Railroad Company, supra (citing *County of Pike v. People*, 11 Ill. 202; *City of Ottawa v. People*, 48 Ill. 233; *Hall v. People*, 57 Ill. 307).

See also :

School Trustees v. The People ex rel., 71 Ill. 559.

Village of Glencoe v. The People ex rel., 78 Ill. 382.

People ex rel. v. Board of Education, 127 Ill. 613.

The writ of mandamus may be granted in such cases not only on relation of a private citizen, but may be granted on relation of the City of Chicago.

26 Cyc. 398.

People ex rel. City of Chicago v. Upham, 221 Ill. 555.

State v. Missouri Pacific Railway Company, 33 Kan. 176.

Inhabitants of Brunswick v. City of Bath, 90 Maine 479.

State ex rel. City of Bridgeton v. Millville Traction Company, 62 N. J. L. 592.

People of State of New York v. Rome, Watertown & Ogdenburg R. R. Co., 103 N. Y. Rep. 95.

With reference to the second point, as to whether the failure of the companies to comply with the orders of the City Council relating to compulsory extensions would not subject the companies to an attack upon their franchises, we beg to state that a specific provision covering this situation is contained in the ordinances of February 11, 1907, to the Chicago Railways Company and the Chicago City Railway Company, respectively, and in the ordinance of March 30, 1908, to the Calumet & South Chicago Railway Company. The provision, which is practically the same in each of the grants to the above companies, **provides as follows:**

“FORFEITURE FOR NON-COMPLIANCE.) Section 31. The Company, by the acceptance of this ordinance, expressly agrees with the said City and obligates itself fully to comply with all of the terms and conditions of this ordinance throughout the period of time covered hereby, and so long as the Company continues to operate any street railways in said City under or by virtue of the authority hereof.

“The Company further agrees that in the event that it shall make default in the observance or performance of any of the agreements or conditions herein required to be kept and performed by it, and if any such default shall continue for a period of three (3) months (exclusive of all times during which the Company may be delayed or interfered with, without its connivance, by unavoidable accidents, labor strikes or the orders or judgments of any court entered in any suit brought without its connivance), after written notice thereof to it from the said City, then and in each and every such case, the said City by its City Council shall be entitled to declare this grant and all of the rights and privileges of the Company to maintain and operate street railways in any of the streets or public ways of the said City to be forfeited and at an end; * * *

Under the above provision, if the companies or any of them have made default with respect to the obligation to construct compulsory extensions, and if such default continues for a period of three months (exclusive of all times during which the company may be delayed or interfered with without its connivance by unavoidable accidents, labor strikes or the orders or judgments by any court entered in any suit brought without its connivance), after written notice by the City, then the city council has a right to declare the grant and all of the rights and privileges of the company to maintain and operate street railways in the streets of the City to be forfeited and at an end; and this the city council can do without even a judicial determination of the breach.

Dillon on Municipal Corporations, 5th Ed., Vol. 3, Sec. 1231, p. 1960.

Plymouth v. Chestnut Hill & N. R. Co., 168 Pa. 181.

Minersville v. Schuylkill Elec. R. R. Co., 205 Pa. 394.

Belleville v. Citizens' Horse Ry. Co., 152 Ill. 171.

Union Street Ry. Co. v. Saginaw Cir. Judge, 113 Mich. 694.

Tower v. Tower & St. R. Co., 68 Minn. 500.

Yours respectfully,

MAX M. KORSHAK,
Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,
Corporation Counsel.

DECEMBER 12, 1914.

In re ACCOUNTING UNDER STREET RAILWAY ORDINANCES.

Hon. Eugene H. Block,

Chairman Committee on Local Transportation.

Dear Sir:

We have before us an opinion addressed to Bion J. Arnold and signed by Walter L. Fisher.

This opinion is surely entitled to the utmost consideration, but for the purposes which it is intended to serve, it is useless in that the writer utterly fails to consider the effect of the \$600,000 limitation of expenditures placed by section 1 of the ordinance upon the expenditures to be made pursuant to its terms.

Contrary to the assertion of the gentleman who wrote this opinion, to the effect that we had not read section 10 of the ordinance when we wrote the opinion, the fact is that we had read it and fully appreciated the effect of said section 10 to be that the items in controversy would be chargeable to capital account were it not for the fact that the full sum of \$600,000 had already been expended.

Section 1 of the ordinance (printed Journal of Council Proceedings of January 29, 1912, page 2689) provides for the acquisition by the Chicago City Railway Company of the property of the Chicago & Southern Traction Company or its receivers, and continues:

“and the said Chicago City Railway Company is hereby authorized to pay * * * such a sum as may be certified under the provisions of section 7 of the said ordinance of February 11, 1907, * * * as being the value and cost of said property, equipment and appurtenances * * *; provided, however, that the total amount so certified, together with the additions thereto allowed, shall not exceed the sum of \$600,000.”

It will be observed that the words “together with the additions thereto allowed” have reference to the words “the total amount so certified.”

It will be further observed that the words “the total amount so certified” have reference to the amount to be paid to the Chicago & Southern Traction Company or its receivers. It follows, therefore, that on ultimate analysis the words “to-

gether with the additions thereto allowed'' refer to amounts certified to be paid to the Chicago & Southern Traction Company or its receivers. We are, therefore, required to look further into the ordinance to determine what was intended to be included in the expression ''together with the additions thereto allowed.'' And on examination we find the solution of the question embodied in section 10, to which the author of the opinion in question is pleased to refer. That section (printed Journal of Council Proceedings, page 2694) provides that in case the Chicago City Railway Company makes the contemplated purchase, it shall pay the cost of paving the street railway right-of-way in Vincennes road between 85th street and 81st street, ''and that the amounts so paid by the Chicago City Railway Company forthwith shall be added to capital account.'' The same section further provides that the Chicago City Railway Company shall pay one-half of the expense incurred in the valuation of the property of the Southern Traction Company ''and that all amounts so paid shall be added to capital account of the Chicago City Railway Company.''

The two items last above referred to are the only two items which, in our judgment, are referred to by the words ''together with the additions thereto allowed'' found in section 1.

Taking the ordinance in its entirety, it reads, in effect, that the amount paid by the Chicago City Railway Company to the Chicago & Southern Traction Company or its receivers, together with the additions thereto authorized to be paid by section 10 of the ordinance, shall not exceed the sum of \$600,000. We therefore regard the \$600,000 limitation contained in section 1 to be an insuperable barrier to any expenditures, under the terms of the ordinance, in excess of \$600,000.

The gentleman who wrote the opinion to which we refer does not take occasion therein to consider the effect of the limitation contained in section 1 of the ordinance upon the expenditures which are authorized to be made by section 10 of the ordinance, and that is the only question upon which the accountants desired an opinion.

The gentleman who wrote the opinion stated to your com-

mittee that, so far at least as published opinions are concerned, he wanted the opinion which we have, and his other opinions of a similar character, to be the last words on the subjects to which they pertain. We believe that your committee would not be corerectly advised if this gentleman's suggestions were to be followed.

Despite the criticisms of the gentleman who wrote the opinion under discussion, we are firm in the conviction that our conclusions on the items involved are correct.

Yours truly,

CHARLES M. HAFT,

• *Assistant Corporation Counsel.*

Approved:

JOHN W. BECKWITH,

Corporation Counsel.

DECEMBER 14, 1914.

In re POWER OF ALDERMAN TO SERVE OUT TERMS OF OFFICE
WITHOUT COMPENSATION UPON ELECTION TO AN-
OTHER OFFICE.

*To the Honorable the City Council
Of the City of Chicago.*

Gentlemen:

On December 7, 1914, your honorable body referred separate communications from Patrick J. Carr, Alderman of the Fifth Ward and Jacob Lindheimer, Alderman of the Third Ward to this department for an opinion in reference thereto.

The purport of the communication from Alderman Carr is that since his election and qualification as a member of the Board of Trustees of The Sanitary District of Chicago, he has been prevailed upon by the citizens of his ward to serve out the remainder of his term as alderman, which expires by operation of law in April, 1915, but that he desired no compensation for his services as alderman and directed his salary to be turned over to the Special Parks Commission of the City of Chicago to be expended by said commission in connection with its work in establishing and equipping playgrounds.

Alderman Lindheimer, in his communication addressed to the mayor and the city council, advised your honorable

body that he was about to become assistant treasurer of Cook County and that while he desired to resign his office as alderman from the Third Ward, he deemed it his duty to perform his obligations to the public until a successor could be elected. Inasmuch as his term of office does not expire by law until April, 1916, he tendered his resignation to take effect next April, when his successor shall have been duly elected and qualified. In the meantime, he requested the city council to advise the comptroller and city treasurer that he would accept no compensation for any services that he might render as alderman.

It is a well established rule of law that no person can hold two incompatible public offices. The acceptance of an office which is incompatible with one already held by the same person is *ipso facto* a resignation of the first office. Whether two offices are incompatible is usually determined by the nature of the duties of the offices. However, two offices which in their nature are not incompatible, may become so by reason of provisions in the laws creating such offices or defining their duties.

People v. Haas, 145 Ill. App. 283.

Section 2 of Part 3 of Article XII of the Cities and Villages Act is as follows:

“No member of the City Council shall at the same time hold any other civil service office under the Federal, State or City government, except in the National Guard, or as a master in chancery or notary public, and except such honorary offices as go by appointment without compensation.”

The language in the foregoing section is quite doubtful in its meaning. The first question which arises is, what is a civil service office within the meaning of the foregoing provision of the statute? Is the inhibition against holding only such offices as are filled in the manner provided by the various civil service acts? If so, why the language that “no member of the city council shall at the same time hold any *other* civil service office”? Why also are officers of the National Guard, masters in chancery and notaries public, etc., expressly excepted? Neither members of the city council, officers of the

National Guard, nor masters in chancery, etc., hold their offices by virtue of the various Civil Service Acts.

Are the words, "civil service office" used in contradistinction to offices in the military service or naval service? If so, why are offices in the National Guard expressly excepted?

We believe, however, that if the Supreme Court were called to pass upon the language quoted they would construe the provision to be applicable to all *civil offices* under the Federal, State or City government excepting those enumerated.

It is not clear, however, that the provision in the Cities and Villages Act heretofore quoted is applicable to the office of Trustee of The Sanitary District of Chicago. It is certain that it is not an office under the City government. The Sanitary District of Chicago is a municipal corporation created by statute. Whether the Supreme Court will hold that the office of Sanitary Trustee is one under the State government is difficult to determine. On the whole, we are inclined to believe that it was the intention of the legislature to prohibit any alderman from holding any other civil office created by the Federal statutes or by the laws of the State of Illinois. In that event, the word "City" used in connection with the word "government" in the section above quoted would have to be held to be superfluous.

It occurs to us, however, that aside from the statutory provision above quoted the nature of the offices of alderman and trustee of the Sanitary District may be held to render the two offices incompatible. Occasions arise when the interests of the city are antagonistic to those of the Sanitary District. For instance, under the act creating The Sanitary District of Chicago, power is given to the board to generate electricity and to transmit the same to the cities and villages within the district. In negotiating contracts with the City of Chicago and the Sanitary District, a person who is a member of the city council as well as a member of the Board of Trustees of the Sanitary District may find himself in an embarrassing situation. Besides, it is the duty of a member of the council as well as a member of the Board of Trustees of the Sanitary District to personally attend the meetings of the respective bodies. The time for holding such meetings may conflict and render it impossible for one person to attend both.

We are therefore of the opinion that the two offices last mentioned are so incompatible that one person cannot hold both. It follows that the city council would have no authority to appropriate the salary of one of the aldermen of the Fifth Ward for the purposes for which the Special Parks Commission of the City of Chicago was created. While Alderman Carr's office as a member of the city council may be regarded as vacant by his acceptance of and qualification as a member of the Board of Trustees of The Sanitary District of Chicago, it would be well for him to tender his formal resignation as alderman to take effect at once, so as to remove all doubts as to his official status.

In the case of Alderman Lindheimer, the question of incompatibility of offices, in our opinion, does not arise. The position of assistant county treasurer is not created by the Constitution nor by the Statutes of Illinois, nor is there any authority for the creation of such an office by the county authorities. His position is a mere place of employment authorized by Section 9 of Article X of the Constitution of Illinois.

In this case another difficulty presents itself. It is apparent from Alderman Lindheimer's communication that he intends to represent his constituents in the city council, without compensation, only until such time as a successor may be elected and qualified. His office does not expire until April, 1916.

Section 4 of Article III of the Cities and Villages Act, (H. R. S. 1911, p. 259), provides:

“If any vacancy shall occur in the office of alderman by death, resignation, removal or otherwise, such vacancy shall be filled by election.”

To call a special election for alderman from the Third Ward the vacancy must exist when such call is made. Alderman Lindheimer's resignation, by its terms, becomes effective in April, after the dates for holding the city election and primary have gone by. Under the primary law, petitions for nomination must be filed at least fifteen days and not earlier than thirty days before the primary, and a notice of the primary election must be given at least twenty days before the primary.

It has been held that a resignation to take effect at some future time amounts to but a notice or intention to resign at a future day or a proposition to so resign, and the resignation may be recalled at any time before the date when, by its terms, it becomes effective.

Nevada v. Murphy, 18 L. R. A. (n. s.) 210.

If it is Alderman Lindheimer's desire that a successor be elected in April, it is imperative for him to tender his resignation to take effect not later than January 18, 1915, so that ample time may be had for the calling of a special election, giving notice thereof and filing of primary petitions. When so tendered, the resignation should be accepted by the council at once.

Respectfully submitted,
JOSEPH F. GROSSMAN,
Assistant Corporation Counsel.

Approved:
BRYAN Y. CRAIG,
Acting Corporation Counsel.

DECEMBER 14, 1914.

In re CONTRIBUTION BY CITY TO EMPLOYEES' PENSION FUND.
To the Honorable The City Council
Of the City of Chicago.

Gentlemen:

On November 30, 1914, your honorable body passed an order directing the Corporation Counsel to submit an opinion to you as to whether the City of Chicago has authority without additional legislation to appropriate money for the benefit of the Municipal Pension Fund of the City of Chicago to supplement contributions of the city employees.

By the second clause of Section 1 of Article V, the City Council is authorized to appropriate money for corporate purposes only, and provide for payment of debts and expenses of the corporation.

In the recent case of *Hughes v. Traeger*, which involved the question of the constitutionality of the Pension act referred to, our Supreme Court held that the provision for the deduction of \$2.00 per month from the salary or wages of each

employee is in effect not a contribution by the city employee but an appropriation of public moneys for a public purpose. It would seem, therefore, that an appropriation of municipal funds to supplement the so-called contributions of the city employees would be held to be an appropriation of money for corporate purposes.

The disposition of municipal funds is nevertheless subject to legislative control. We believe that the act creating the municipal pension fund limits the amount of public moneys, which may be appropriated to that purpose, to the sum of \$2.00 per month, from the salary or wages of each employee.

Section 1 of the act referred to provides:

“Said fund shall consist of amounts of two dollars a month retained or deducted by the comptroller of such city, village or town from the salaries or wages of each employee, and such other sums as are hereinafter referred to.”

(See Hurd's Rev. Stat. 1913, p. 483.)

The “other sums” referred to in the foregoing provision are those which the Board of Trustees of the Municipal Pension Fund are empowered to accept by gift, grant, bequest or otherwise. (See 4th clause of Section 4 of the act creating the Municipal Pension Fund, Hurd's Rev. Stat. 1913, p. 484.)

We are of the opinion that the provision last referred to is limited to such money as may be paid into the municipal pension fund by voluntary private contributions and does not authorize the City Council to appropriate public moneys for the benefit of that fund to supplement the so-called contributions of the city employees without additional legislative authority.

Respectfully submitted,

JOSEPH F. GROSSMAN,

Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,

Corporation Counsel.

DECEMBER 15, 1914.

In re RIGHT OF TRACTION COMPANIES TO REMOVE SIDEWALKS
IN FRONT OF CAR BARNs.

Hon. Carter H. Harrison,
Mayor.

Dear Sir :

On December 8th, 1914, you transmitted to us communications with reference to the absence of sidewalks in front of the barns of the Chicago Surface Lines and you desire to know by what authority the traction companies have removed the sidewalks in front of their car barns.

Replying thereto we beg to state that Exhibit A of the ordinances of February 11, 1907, to the Chicago Railways Company and the Chicago City Railway Company respectively, permits said companies—

“* * * to construct, maintain and operate all curves, crossings, cross-overs, turnouts, branch-offs, switches and connections within the streets, alleys and public places above specifically described, connecting and necessary and convenient to connect tracks authorized by this ordinance, or to connect said tracks, or any of them, or its tracks or private property, with the tracks of other corporations or with power houses, substations, car houses, shops, yards and other property now used or hereafter required to be used in the operation of its street railways under the powers given by this ordinance; * * *”

Under this provision the companies have the authority (after first securing a permit from the Commissioner of Public Works) to tear up so much of the sidewalks in front of their car barns as is necessary for the laying of tracks, to connect the rights of way of the said companies with their car barns. Under this provision, however, the companies have no authority to remove parts of sidewalks, *not necessary to be torn up*, for the laying of tracks to connect the rights of way of the companies with their said car barns. Furthermore, the ordinances of the city specifically forbid the tearing up or injuring of sidewalks or pavements.

Section 2445 of The Chicago Code of 1911 provides as follows:

“2445. INJURY TO PAVEMENTS.) No person shall injure or tear up any pavement, side or cross walk, or

any part thereof, dig any hole, ditch or drain in, or dig or remove any sod, stone, earth, sand or gravel from, any street, alley or public ground in the city, without having first obtained written permission from the department of public works given in accordance with the provisions of the ordinances of the city. * * *"

Under the foregoing section if the companies have torn up any sidewalk or pavement in the city without first having secured permission therefor, from the Commissioner of Public Works, they are amenable to prosecution.

We have submitted the list of car barns transmitted by you to us, to Mr. Fisher of the Streets and Alleys Department. That official informs us that with the exception of very few car barns, no sidewalks existed in front of the car barns named in said list at the time the barns were constructed and he suggests that the violation of the companies, if there is any, is not so much in removing sidewalks where such sidewalks existed prior to the erection of the car barns as the constructing of sidewalks in a manner which does not comply with the specifications of the ordinances of the city. He refers to section 2276 of The Chicago Code of 1911, which is as follows:

"2276. SIDEWALKS TO BE CONSTRUCTED ACCORDING TO PRESCRIBED SPECIFICATIONS—PENALTY.) In all cases except where sidewalks are to be laid in accordance with the provisions of special assessment or special taxation ordinances, it shall be unlawful for any person or corporation to construct, lay or rebuild any sidewalk on any portion of the public streets or alleys of the city, except in compliance with the specifications hereinafter prescribed in this article, under a penalty of not less than ten dollars nor more than fifty dollars for each violation of this article, and each day that such sidewalk shall remain so constructed, laid or rebuilt in violation of this article shall be a separate and distinct offense, and any person so violating this article shall be liable to a like penalty for each and every day that such sidewalk remains so constructed, laid or rebuilt."

(Then follow specifications for cement, stone, macadam and cinder sidewalks.)

Under the last provision the traction companies in laying down sidewalks in front of car barns are compelled to

construct said sidewalks in compliance with the specifications contained in the ordinances of the City of Chicago. If the companies in constructing sidewalks in front of car barns have failed to comply with the specifications named in the ordinances of the city above referred to, they are liable to prosecution.

We are returning herewith letter of L. E. McGann addressed to you, dated November 19th, 1914, copy of letter of the Superintendent of Streets addressed to H. B. Fleming, Engineer Chicago Surface Lines, and list of car barns according to wards, stating condition of the sidewalk in front of each car barn.

Yours very truly,

MAX M. KORSHAK,

Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,

Corporation Counsel.

DECEMBER 15, 1914.

In re JURISDICTION OF SOUTH PARK COMMISSIONERS OVER
COTTAGE GROVE AVENUE BETWEEN 59TH AND 60TH
STREETS.

HON. L. E. MCGANN, Commissioner of Public Works.

Dear Sir:

In answer to your communication of the 23d ult., in which you inquire whether Cottage Grove avenue between 59th and 60th streets is within the jurisdiction of the South Park Commissioners or within the jurisdiction of the City of Chicago, I wish to say that under the terms of the "Act to provide for the location and maintenance of a park for the towns of South Chicago, Hyde Park and Lake, in force February 24, 1869," the commissioners to be appointed thereunder were given control over certain streets running along the lands selected for park purposes.

Cottage Grove avenue, which was an established highway at that time, is not named among the streets over which the act confers jurisdiction. (See Section 4.)

Perhaps to remedy this defect a supplemental act was passed which became effective April 16, 1869.

Section 5 of the latter act confers upon said park commissioners jurisdiction over all streets running longitudinally along and adjoining the proposed parks, "without obstructing by fences or other structures, free access to the said streets from existing roads and streets, and by the owners of land abutting on the same.

The question of jurisdiction was raised in a special assessment proceeding brought by the City of Chicago for the paving of the east half of Cottage Grove avenue from Drexel square to the center of 59th street to which the South Park Commissioners were not made parties, the park property running along the west side of Cottage Grove avenue.

By a stipulation entered into the city admitted that the park board had made certain improvements on the west side of the roadway and that the east side of the street had never been improved.

The several acts of the Legislature were also relied upon by the property owners in their objections to said special assessment. The objections were sustained in the County Court and the city appealed to the Supreme Court.

In *City of Chicago v. Carpenter et al.*, 201 Ill. 402, the court upheld the contentions of the objectors and affirmed the judgment of the lower court.

In *City of Chicago v. Partridge*, 248 Ill. 442, Partridge, who was a party in the other case, but who failed to join in the appeal, raised the question of *res judicata* in a second special assessment proceeding for paving Cottage Grove avenue from 51st to 59th street.

In this case the court held that the question of jurisdiction raised in the Carpenter case was only collateral to the main issue, and since the South Park Commission had not been a party to the case it was not precluded from denying its jurisdiction in any subsequent suit to which it might be a party.

It would appear from this that the question of jurisdiction is not yet in issue, and until it is raised I am warranted in assuming that the South Park Commission in making the improvements along the west side of Cottage Grove avenue evi-

denced an intention to limit its obligation to maintain that side of the street.

While this is true as to the street up to 59th street, we are confronted with the fact that between 59th and 60th streets the park is the owner of the land on both sides of Cottage Grove avenue and might require its approval to the laying of any conduits in said block by the city.

As the matter stands, the Park Commissioners have evidently never assumed full jurisdiction and have by this act limited the obligation of the park to repair and maintain the whole street.

They must then be held to have only concurrent jurisdiction with the city, which, through its City Council, has exercised jurisdiction in the passage of the several street railway ordinances and otherwise.

This matter appears of sufficient importance to have the respective boundaries of the two jurisdictions better defined.

Very truly yours,

NICHOLAS MICHELS,
Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,
Corporation Counsel.

DECEMBER 15, 1914.

In re POWERS AND DUTIES OF THE CITY MEMBER OF THE
BOARD OF SUPERVISING ENGINEERS.

HON. EUGENE H. BLOCK, Chairman, Committee on Local
Transportation.

Dear Sir:

In your letter under date of December 3, 1914, you ask this department for an opinion setting forth the powers and duties of the city member of the Board of Supervising Engineers. Replying thereto we beg to state:

The ordinances of February 11, 1907, granting rights to the Chicago Railways Company and the Chicago City Railway Company, respectively, nowhere define the duties of the city's representative on the Board of Supervising Engineers as an individual member of such board. The various

powers and duties are throughout the ordinances referred to as the powers and duties of the "Board of Supervising Engineers."

To specify in detail the powers and duties of the city member on said board would require us to set out the duties and powers of the entire Board of Supervising Engineers.

While of course the duties of the city member are inseparable from the duties of the board, yet we believe that there is by implication imposed upon the city member of the board (in the acceptance of his appointment by the city), the duty of particularly watching and looking after the interests of the city, which he especially represents, in all matters coming before such board in which the city is an interested party.

With regard to attendance at meetings we call your attention to the following provisions contained under the heading "Salaries and Expenses," found in the ordinances of February 11, 1907:

"Each of the other two members of said board shall, in addition to attending the monthly meetings of the board, attend such other meetings as may be called by the chairman, and be paid for his services as a member of said board compensation at the rate of one hundred dollars (\$100) per day, and his traveling and living expenses while away from his home and actually engaged upon this work, it being understood that his total compensation for services shall not be less than thirty-six hundred dollars (\$3,600) nor more than ten thousand dollars (\$10,000) per year. The chairman of said board shall call (in addition to such meetings as he may deem desirable or necessary) a meeting of said board at any time upon request of the president of either of said companies, or the Mayor of said city."

The attendance by the city representative of meetings other than those of the board is optional with such city representative. It is to be presumed, however, that in attending meetings other than those of the Board of Supervising Engineers (as for example the meetings of the Local Transportation Committee) and in other ways keeping in touch with the city officials interested in securing the best transportation service for the city, the city representative will be better able to obtain the viewpoint of the city in all matters coming be-

fore him, with the result that he will be in a better position to look after the interests of the City of Chicago, which he particularly represents on the Board of Supervising Engineers.

Yours very truly,

MAX M. KORSHAK,

Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,

Corporation Counsel.

DECEMBER 19, 1914.

In re CITY'S PRESCRIPTIVE RIGHT TO USE LOTS 25 AND 26, BLOCK 1, AND LOTS 25 AND 26, BLOCK 2, IN EDWARDS & DANA'S ADDITION FOR STREET PURPOSES AS A PART OF BELLEPLAINE AVENUE.

HON. MICHAEL ZIMMER, City Comptroller.

Dear Sir:

Under date of October 13, 1914, Mr. Joseph F. Peacock, City Real Estate Agent, has asked this department for an opinion as to whether the City of Chicago has a prescriptive right to use Lots 25 and 26, Block 1, and Lots 25 and 26, Block 2, in Edwards & Dana's Addition, for street purposes as a part of Belleplaine avenue. Accompanying said letter is:

(a) A tax deed by Peter B. Olsen, County Clerk, to the City of Chicago, dated July 8, 1904, conveying Lots 25 and 26 of Block 1.

(b) Carbon copy of quitclaim deed dated December 14, 1898, by C. F. Kimball and Ethel Kimball to the City of Chicago, conveying (with other property) Lots 25 and 26 in Block 1 in Edwards & Dana's Addition.

(c) Sheets showing tax search from 1874 to 1900, by which it appears that the taxes on the aforesaid four lots were paid at various times by private individuals and were many times sold for taxes.

(d) Letter of Robert H. Stoll, dated April 25, 1910, in which he claims to be the owner of said Lots 25 and 26 in said Block 1, and states that at no time have condemnation proceedings been started by the city to acquire these lots; that the city maps show these lots are not a part of the street, but that the county maps (used for taxing purposes) show these two lots to be a part of

the street or desired by the city for street purposes, and that the county records show for some years back that the lots have been exempt from taxation.

(e) Copy of letter of City Real Estate Agent dated May 10, 1910, addressed to the Corporation Counsel, setting forth that Donnelley's Atlas of Chicago, corrected to January 1, 1909, shows the four lots to be private property; that Lots 25 and 26 in Block 1 would form the southern half of Belleplaine avenue between Syracuse and Springfield avenues if opened through, and Lots 25 and 26 of Block 2 would form the southern half of Belleplaine avenue between Syracuse and North 40th avenues.

(f) Opinion of Assistant Corporation Counsel George M. Bagby, dated June 16, 1910, setting forth that he is advised that sidewalks have been laid, water pipes placed and sewer connections effected, and that the city in various ways has exercised and is exercising dominion over the land; that he is reliably informed that for more than 20 years last past these four lots have been continuously, openly and notoriously used by the city as a part of Belleplaine avenue; quotes from the letter of one resident to the effect that Belleplaine avenue had been open as a street since 1888—this letter, however, is not explicit as to each of the four lots.

Further investigation shows that tax deeds have been issued to the city for Lots 25 and 26 in Block 2 as follows:

County Clerk to City of Chicago, tax deed dated July 8, 1904, and recorded July 29, 1904, as document No. 357207.

County Clerk to City of Chicago, tax deed dated September 16, 1902, and recorded September 13, 1902.

Belleplaine avenue between Springfield and Crawford avenues was paved with asphalt in 1902 under an ordinance passed April 22, 1912, to a width of 26 feet, special assessment warrant No. 40163.

Assessment roll and plat show the four lots in question as part of Belleplaine avenue, and they were not assessed. Official in Board of Local Improvements says they were exempted because assessor's and county treasurer's books show these four lots marked "exempt street." In assessor's office, the reason given for marking these lots "exempt" is that they were so marked when the board was created in 1899, and that the office has continued to consider them exempt.

Belleplaine avenue between Springfield and Crawford avenues is now used as a paved street, with cement walks on each side of the street, showing a street width of nearly 66 feet as indicated by the inside sidewalk lines. There are city arc lamps on the south side of Belleplaine avenue (which is the portion of the street occupying the lots in question). These cement walks were not laid by the city, but were laid by the owners of adjacent lots. An ordinance was passed requiring sidewalks to be laid on the south side of Belleplaine avenue between Springfield and 40th avenues, May 15, 1905. The cement walks on the south side of the street, according to the markings thereon, appear to have been laid in the years 1903, 1905 and 1908.

Mr. Charles A. Cook, principal of the Linne School, Sacramento and Belmont avenues, who lives at 4000 Belleplaine avenue, states that he has resided at his present address for 28 years, and that as long as he has lived there the street has been opened as a public highway and used as such to its present width. Prior to the construction of the present cement walks, there was a five-foot plank walk on the south side of the street for a period of 15 years or more.

Mrs. Anna A. York, living at 4050 North Springfield avenue, acquired title to Lot 1 in Block 1 in 1902. Her lot lies immediately south of said Lot 26 in Block 1. She states that when she came there to live, there was a wooden walk on the south side of Belleplaine avenue, but that in 1905 she laid the present cement walk; that no opposition was made to it by any one claiming to own the south half of Belleplaine avenue at that point, or said Lot 26 in Block 1, nor by any person. Mrs. York has paid the five instalments for the street paving assessed against her lot.

Lot 1 in Block 2, located at the southwest corner of North Harding and Belleplaine avenues, is owned, as shown by record, by Louis M. Nelson, who also appears of record to be the owner of Lots 25 and 26 in Block 2, which are two of the lots in question. Mr. Nelson has paid the first and second instalments for the paving of Belleplaine avenue as assessed against his Lot 1 of said Block 2. Such payment by him of these assessments shows an intent on his part to treat the said

Lots 25 and 26 in Block 2 as a part of the street, and will tend to operate as an estoppel against any claim made by him.

As appears from the plats in the city map department, the other lots in Blocks 1 and 2 of Edwards & Dana's Addition are all 50 feet in width, and only Lots 25 and 26 in Block 1, and Lots 25 and 26 in Block 2 of said addition, are shown as 33 feet in width. This might seem to indicate that these lots were intended to be dedicated as the south half of Belleplaine avenue.

From the foregoing, it appears that these lots have been openly and uninterruptedly used by the public as a highway for more than 25 years, and so far as we are able to ascertain with the knowledge of the owner, and the public taxing authorities have treated these lots as a part of the street by marking them "exempt" on the assessor's books for a period of at least 15 years. The city has had color of title by the Kimball deed to Lots 25 and 26 in Block 1 for 16 years. The street has been paved and the four lots have not been assessed to bear any portion of the cost of paving. Board and cement sidewalks have been laid and used for more than 15 years over these lots, and we have obtained no information tending to show that any alleged owner or owners of these lots ever objected to the laying of these sidewalks, or the use of the same, or has ever attempted to remove them, and the erection and maintenance of the city arc lamps is a further evidence of the public's right and easement in this strip of land.

From the statement of Mr. Cook, it appears that the property has been used as a certain and well defined line of travel for a period of more than 25 years. All of these facts and circumstances have a strong tendency to establish a prescriptive right in the public to use this property as a highway irrespective of the fact that the same may never have been dedicated as such by any owner of the property.

I am therefore, of the opinion, that the city has acquired a prescriptive right, for use as a highway, in and to Lots 25

and 26 in Block 1, and Lots 25 and 26 in Block 2, in Edwards & Dana's Addition.

Respectfully submitted,

JAMES G. SKINNER,
Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,
Corporation Counsel.

DECEMBER 19, 1914.

In re OPENING EAST 103D STREET.

HON. EDWARD J. GLACKIN,

Secretary Board of Local Improvements.

Dear Sir:

The opening of East One Hundred Third street through the Lake Calumet region and across the northern end of Lake Calumet, is a matter that has been urged for some time and the question of how to proceed legally along and about the northern end of Lake Calumet has been submitted to this department.

It is proposed to have a street one hundred feet in width, the north half of which, in the region indicated, will occupy the south fifty feet of the S. E. $\frac{1}{4}$ of Sec. 11 and the south fifty feet of the S. W. $\frac{1}{4}$ of Sec. 12 and the south half of which will occupy the north fifty feet of the fractional W. $\frac{1}{2}$ of Sec. 13 and the north fifty feet of the fractional E. $\frac{1}{2}$ of Sec. 14, all in T. 37 N., R. 14 E. of the 3d P. M., and also a portion of the south half of said street will occupy that part of the northern end of Lake Calumet fifty feet in width north and south, which lies immediately south of the south line of the S. E. $\frac{1}{4}$ of said Sec. 11 and the S. W. $\frac{1}{4}$ of said Sec. 12.

In consideration of the questions involved, with reference to the several tracts above described, I have carefully examined all maps and plats of government surveys that have been made in so far as the same have been supplied in an abstract furnished by the Chicago Title and Trust Company, dated July 24, 1914, and from such other sources to which I have had access, together with certified copies of the field notes of these surveys supplied by the State Auditor of Public Ac-

counts; I have further considered later surveys made at the instance of private owners and the City of Chicago, and, in addition thereto, have read and considered numerous decisions of the Supreme Courts of the United States, of Illinois and various other states, together with the rules and instructions of the Department of Interior to the government surveyors, in so far as I have had access to the same, and from such investigation of the facts and the law I have reached the following conclusions:

I.

That the title to the south fifty feet of the S. E. $\frac{1}{4}$ of said Sec. 11 and the south fifty feet of the S. W. $\frac{1}{4}$ of said Sec. 12 is a private title and subject to condemnation.

II.

That so far as it is upland the title to the north fifty feet of the fractional E. $\frac{1}{2}$ of said Sec. 14, at least in part, is a private title, and may be as to the entire said north fifty feet of upland a private title; that the most practical way of treating this tract, in order to get reasonably early results, is to treat the entire upland as subject to condemnation; and that if any portion of said last-mentioned tract is not held in private ownership it is the vacant and unoccupied property of the State of Illinois; it is, therefore, either subject to condemnation for street purposes or may be taken, under the provisions of Section 7 of the Harbor Act of June 23, 1913, as an approach to a city harbor district.

III.

That the title to the north fifty feet of the fractional W. $\frac{1}{2}$ of said Sec. 13 is held by private title and is subject to condemnation.

IV.

That that portion of the northern end of Lake Calumet which is the fifty feet lying immediately south of the south line of the S. E. $\frac{1}{4}$ of said Sec. 11 and the south line of the S. W. $\frac{1}{4}$ of said Sec. 12 is submerged lands, the title to which is in the State of Illinois and may be taken by the City of Chicago, under Section 7 of the Harbor Act of June 23, 1914, as and for an approach or connection to or with a harbor utility in a harbor district established or to be re-established by the city.

I advise that Harbor District No. 4 be re-established under said Act of June 23, 1913.

V.

The results of my investigation as to the facts and the laws involved in the questions above referred to have been written out and cover about forty-five typewritten pages, but, owing to the length of this statement, I do not deem it advisable to embody the same in this opinion.

Respectfully submitted,

JAMES G. SKINNER,
Assistant Corporation Counsel.

I have examined the foregoing questions and have availed myself of the material gathered by Mr. Skinner; after a careful consideration of the same, I concur fully in the conclusions above stated.

EUGENE H. DUPEE,
Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,
Corporation Counsel.

DECEMBER 23, 1914.

In re FIREMEN'S PENSION ACT.

HON. THOMAS O'CONNOR, Fire Marshal.

Dear Sir:

At a meeting of the committee of firemen on amendment of firemen's pension law, which the Corporation Counsel was requested to attend, the writer was orally requested to advise you upon the following matters: 1. Would a provision in the firemen's pension act for levying a tax for the benefit of the firemen's pension fund be valid? 2. Would a provision in the pension act authorizing the payment of a pension to the widow of a deceased fireman who should die while in the service of the fire department, in lieu of the present provision for the payment of such pension on account of death in the performance of duty, be valid?

In a recent case entitled *Hughes v. Traeger et al.*, decided by the Supreme Court, it was held that the legislature has authority to set aside public funds for the benefit of a

pension fund. That case determines conclusively the validity of the first proposition.

Regarding your second question, we can see nothing unlawful in any provision setting forth the conditions under which a pension should be allowed by the board of trustees. That is a matter exclusively within the jurisdiction of the legislature.

The object of the creation of pension funds is to induce citizens to accept the hazardous employment, which is an attribute of service in the fire department, as well as to provide additional compensation for long and faithful service. A provision such as you suggest we believe would not be inconsistent with the object of such a law.

We wish to be understood, however, that we are not passing any opinion upon the wisdom or the policy of the proposed amendments to the pension law.

Yours very truly,

JOSEPH F. GROSSMAN,
Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,
Corporation Counsel.

DECEMBER 23, 1914.

In re COMPELLING CHICAGO & OAK PARK ELEVATED RAILROAD
COMPANY TO PAY FOR POLICEMEN AT CROSSINGS IN
AUSTIN, OR FURNISH ADEQUATE PROTECTION AT
SUCH CROSSINGS.

HON. EUGENE H. BLOCK,

Chairman Committee on Local Transportation.

Dear Sir:

In the above matter in which we have already reported to you several times, we now beg to further report as follows:

On Monday, the 14th instant, the Council passed an order directing (among other things) that the sixteen policemen, who have been on duty at the crossings of the Chicago & Oak Park railroad referred to in the above title, be taken off and returned to regular duty as patrolmen.

An inquiry addressed to the Chief of Police has elicited

the information that this order was carried into effect and the policemen taken off on the morning of yesterday (December 22, 1914). The motion before Judge Kohlsaas of which we spoke in a former report, came on for hearing before the judge yesterday morning.

The notice of this motion which was served before these policemen were ordered to be removed, asked that the receiver be directed either to pay the salaries of the policemen stationed by the city at the crossings, or to place at each such crossing a flagman as well as a gateman.

The fact of the policemen being ordered off and taken off before the motion was made eliminated the question of payment of future salaries. As to this part of the motion, therefore, it became simply a question of whether the court would order such payment of the back salaries of the policemen; and, as we anticipated in a former report to you, the judge refused to order this. He put his refusal upon the ground, amongst other grounds, that neither the company nor the receiver had ever asked to have these policemen put there, or ever admitted that they were needed there. Indeed, the solicitor for the receiver went so far as to state in the course of the discussion that the policemen stationed there did more harm than good, and that the receiver was very glad they had been removed.

As to the second object sought to be obtained by the motion as above stated, the judge said, in substance, that he could not pass upon that until he knew what kind and degree of protection the receiver was affording, after the removal of the policemen. If, after a few weeks, we remained of the opinion that the protection afforded was inadequate, we could renew our application. He offered at first to continue the motion for two weeks as to this question, but ultimately the motion was denied generally with liberty for the intervener to renew the application for additional protection, if so advised.

From what was said by counsel for the receiver in the letter already referred to you, as well as at this hearing, we would infer that it is the intention of the receiver to continue the present practice as to protection at these crossings, with

possibly the addition of a flagman at one or two of the crossings.

As you are aware the practice is to have gates at each crossing, and to have a man to operate these gates, who is protected in cold weather by a shanty, from which he has to issue forth every time he has to raise or lower the gates to a sort of sawed-off sentry box without a roof, which stands between the tracks, and in which he stands at the time he operates the levers. The object of this sentry box arrangement, as we understand it, is to protect the man against being hit by passing trains, while he is operating the levers, and at the same time to enable him to stand in such a place, and with such unobstructed vision that he may be able to see both ways on the street which is being crossed by the tracks, while he is operating the levers.

We would respectfully suggest that you ask the aldermen in whose wards (fourteenth, thirty-third and thirty-fifth) these crossings are, to observe conditions there for the next few weeks, and to report to you whether in their opinion the protection being afforded is adequate. If they shall report that, in their opinion, the protection is inadequate, and if you will so advise us, we shall renew our application to the court for further protection.

Yours respectfully,

WILLIAM DILLON,

Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,

Corporation Counsel.

DECEMBER 23, 1914.

In re MAINTENANCE OF METER VALVES.

HON. L. E. MCGANN,

Commissioner of Public Works.

Dear Sir:

We wish to acknowledge receipt of your communication of August 29, 1914.

An opinion is asked as to whether or not the owner or occupant of the premises, or the city, shall install, maintain and defray the expenses of repair of meter vaults.

Section 2776 of The Chicago Code of 1911 is in part as follows:

“2776. LOCATION OF METER—FREE ENTRY TO PREMISES, ETC.) Water meters shall be located at such place, within or without the premises, and in such manner as the commissioner of public works shall direct. Boxes or vaults in which meters are to be placed shall be made in accordance with specifications to be prescribed by the commissioner of public works.”

Therefore, in view of the requirements of the above referred to section, we are of the opinion that it is incumbent upon the owner, occupant or lessee of the premises to install at his own expense said meter vaults or boxes. Otherwise the above provision of the ordinance would not specify that said vaults should be made in accordance with the specifications prescribed by the Commissioner of Public Works.

Yours very truly,

M. W. CAGNEY,
Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,
Corporation Counsel.

DECEMBER 23, 1914.

In re DEFINITION OF RESTAURANTS AS REFERRED TO IN CITY
ORDINANCE CONCERNING FOOD INSPECTION.

HON. GEO. B. YOUNG,
Commissioner of Health.

Dear Sir:

We wish to acknowledge receipt of your communication to this department of December 5, 1914.

An opinion is requested as to what constitutes a restaurant under the terms of the ordinance for the purpose of food inspection, also as to what relation are delicatessen lunches, boarding houses and saloon lunches, served only at noon, to restaurants.

In the case of *Cecil v. Green*, 60 Ill. App. 61, p. 63, the court has adopted Webster's definition of a restaurant, which is as follows:

“A ‘restaurant’ is an ‘eating house,’ and an eating

house is itself defined as a house where provisions are sold, ready cooked and generally eaten on the premises."

This case was affirmed by the Supreme Court in 161 Ill. 265.

Therefore, we are of the opinion that a place where a delicatessen lunch is served and that a saloon where lunch is served, both only at noon, for a consideration, and which cater to the public generally, are restaurants under the provisions of Article XV, Chapter XLIII of The Chicago Code of 1911.

We are also of the opinion that boarding houses do not come under the provisions of said chapter, and that the following is a correct definition of a boarding house:

"If meals are served only in pursuance of previous arrangements as to particular individuals, rather than to any one who may apply, it is a private boarding house only and not an eating house." *Humbard v. Crawford*, 128 Ia. 743.

In the case of the delicatessen lunch and the saloon, the places where they are served being open to the public so that anyone may partake of same upon payment of the price charged, they are different from a boarding house, and must be classed as eating houses or restaurants.

Yours very truly,

M. W. CAGNEY,
Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,
Corporation Counsel.

DECEMBER 23, 1914.

In re REAPPROPRIATION OF UNEXPENDED MONEY SECURED FROM
SALE OF AUTHORIZED BOND ISSUES.

HON. GEORGE B. YOUNG, M. D.
Commissioner of Health.

Dear Sir:

You call attention to the fact that there is an unexpended balance of \$3,379.96 in the appropriation for the extension of the Mavor bath and of \$5,141.52 in the appropriation for the new fifth ward bath which will not be required

for any further work on these buildings, and you ask whether these sums can be reappropriated in the 1915 budget and used for repairs, improvements or construction for other baths. It seems that the money appropriated for the two buildings mentioned above was obtained from the proceeds of the bond issue for buildings for the Department of Health, under the ordinance of February 19, 1912 (C. J., p. 2816), approved by the voters in the subsequent municipal election.

The ordinance in question authorized the issuance of bonds for acquiring the necessary sites and constructing a contagious disease hospital "and other buildings for the Health Department of the City of Chicago." In the absence of anything else to indicate the intention of the City Council in passing the ordinance, the language might be construed as broad enough to permit the use of the money derived from the sale of these bonds for any building which the City Council might decide was necessary, although even in that event, the use of same would have to be limited to the acquisition of sites and construction of buildings and not to repairs and improvements on baths or other buildings already erected.

We find, however, that the City Council, at the time it passed the appropriation ordinance for the year 1912 (see Council Journal January 2, 1912, p. 2374), under the head of "Appropriations for Construction and Betterments" made appropriations for certain buildings in the Department of Health to the extent of \$380,000, which was the amount of the bond issue afterwards authorized. Such being the case, it is clear that it was the intention of the City Council to issue bonds for the purpose of constructing the buildings for which the contingent appropriation was made.

The voters in consenting to the issuance of these bonds must be presumed to have acted on the theory that they would be used for the specific purpose which the appropriation bill indicated they were intended for. Our conclusion, therefore, is that the unexpended balances to which you refer cannot be used for any repairs, improvements or construction of buildings that are not included within the original appropriation for which the bonds were issued, but that the same may be used for completing and improving any one of the buildings

mentioned in the said appropriations of 1912. This may be done even though one or more of the buildings in question required less money than was ordinarily contemplated while others required more, because it can be assumed that it was not the intention of either the City Council or the voters to leave any one of those buildings in an incomplete state, and in passing the said ordinance and approving the same at the election, ample authority was conferred on the City Council to appropriate the moneys in such proportion as they saw fit for the various structures about to be erected.

Yours respectfully,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,
Corporation Counsel.

DECEMBER 28, 1914.

In re VALIDITY OF ORDINANCE REQUIRING RAILROADS TO STOP
AT EACH GRADE CROSSING.

HON. EUGENE BLOCK,
Chairman Committee on Local Transportation.

Dear Sir:

In your letter of December 19, 1914, you ask this department to furnish your committee with an opinion concerning the validity of an ordinance requiring railroad trains to come to a full stop at each grade crossing. Replying thereto we have to say:

Municipal corporations have the power to regulate and restrict by ordinance the rate of speed of trains and locomotives while running within the corporate limits of such municipal corporations, and such regulations have always been upheld and enforced when reasonable.

Clause 21, Section 1, Article V, Cities and Villages Act.
33 Cyc. 668, and cases cited.

C. & A. R. R. Co. v. City of Carlinville, 200 Ill. 314.

In this last case the Supreme Court was called to pass on the validity of an ordinance which made it unlawful for

any passenger train to travel at a greater rate of speed than ten miles per hour in the City of Carlinville.

The court said at page 322:

“The argument of appellant amounts to but this: if this ordinance and similar ordinances in the other municipalities along its line are valid and are enforced, its schedule time must be lengthened, the effect of which will be that it will be unable to give to its patrons the service which they demand and which its competitors offer them, and it cannot successfully operate its road. This may seem, in some degree, to be true; but a requirement that it stop its trains at railroad crossings and draw-bridges has the same effect, still such regulations are held valid. * * *

In *City of Buffalo v. N. Y. L. E. & W. R. R. Co.*, 152 N. Y. 276, an ordinance of the City of Buffalo imposed a penalty for any passenger train to cross either of five designated streets in the city without first coming to a full stop. While the court in this case was inclined to hold that the particular ordinance was void for the reason that it was discriminatory, in that it exempted other streets of the city where the traffic was much greater, yet the court did not question the power of the city to require trains to come to a full stop before crossing streets.

While we believe that the city has ample power to regulate the movements of trains within the corporate limits of the city, yet we fear that an ordinance requiring trains to stop at *each* crossing within the limits of the city might be construed as harsh and unnecessary and hence invalid.

If the ordinance were confined in its operation to limited points where traffic is great, the ordinance could probably be sustained. But where the ordinance requires trains to stop at *all* grade crossings, regardless of what the traffic conditions are at such crossings, and of whether the traffic warrants the stopping of trains at such crossings, there is danger that the courts might declare such an ordinance unreasonable. This was the view of the courts in the following cases:

Evison v. C. St. P. M. & O. Rwy. Co., 45 Minn. 370.

Burg v. C. R. I. & P. R. R. Co., 90 Ia. Rep. 106.

Meyers v. C. R. I. & P. R. Co., 57 Ia. 555.

These cases and many others indicate that it is not so much a question of the power to pass the regulation as the reasonableness of such regulation as applied to the particular state of facts.

We are of the opinion that an ordinance requiring railroad trains to come to a full stop at each grade crossing would be difficult to sustain for the reason that courts might hold the regulation unreasonable.

Yours very truly,

MAX M. KORSHAK,
Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,
Corporation Counsel.

DECEMBER 28, 1914.

In re CONDITION OF CITY'S REVENUE AND FINANCES.

HON. OTTO KERNER,

Chairman Committee on Judiciary, State Legislation,
Elections and Rules.

Dear Sir: .

Some time ago the City Comptroller directed the attention of your committee to the necessity of legislative action in order to meet the condition that will arise in 1916, when the three-year limitation placed in the amended Juul Law will have expired. The Comptroller at the same time requested that the Law Department should co-operate with the committee in the framing of a bill for the purpose.

The committee has not yet taken the matter up in a formal way, but since the legislature is soon to convene, we deem it proper to lay before you a statement of the situation and the draft of a bill to remedy same, so that you can take action on the recommendation of the Comptroller.

The members of your committee are no doubt familiar, in a general way, with the circumstances leading up to the enactment of the amendment containing the three-year limitation of which we speak. These circumstances, in brief, are as follows:

Prior to the year 1912 the County Clerk, in extending the

taxes for the City of Chicago in accordance with the city's tax levy ordinance after the rate had been reduced by the scaling process required under the Juul Law, would extend the \$1.10 prescribed as a minimum for the city, and in addition thereto would extend such further rate as was necessary to meet the interest and to provide a sinking fund for bonds as they matured. Such additional rate would vary from year to year, running all the way from 35 cents to 45 cents. About July 1, 1912, the Supreme Court, in deciding a case involving the construction of the law in one of the southern counties of the state, held that it was improper to extend such additional rate, thereby wiping out the revenues of the city derived therefrom, which in that year amounted in round numbers, to \$3,700,000, considerably more than one-third of the entire amount received that year from taxes. Such a shrinkage necessarily resulted in a situation that was critical, and an appeal was made to the legislature, when it convened in 1913, to change the law so that the County Clerk would be authorized to extend the additional rate in the same manner as he had done before the year 1912. In order to secure the passage of the proposed act it was found necessary to limit the time during which this relief would be granted, and a provision was inserted which restricted such additional rate to "a period of three years beginning with the year 1913."

From the above you will observe that unless there is something done at the coming session of the legislature to provide for the revenue that will be lost to the city under the construction of the act placed upon it by the Supreme Court, the city during the year 1916 will again be reduced to a rate of \$1.10, with which to meet both its current corporate needs and the obligations accruing from outstanding bonds, which at that time will require even a larger levy than in 1912.

It is quite likely that in thus limiting the period for which the additional rate should be extended, the legislature had no other purpose in view than the passage of some other act in the meanwhile to take care of the shortage in a different way. An act was in fact passed at that session which, if adopted by the voters of the City of Chicago, would have permanently remedied the difficulty—the Park Consolidation

Act. But this act did not receive the sanction of the Governor, and therefore the effect of making the limitation is that the law in 1916 will be the same as it was in 1912 if it is not again amended, while the shrinkage of revenue for general corporate purposes will be even greater than before on account of a larger amount of bonds having been issued which are now outstanding.

Some idea of what the amount of this shrinkage would be in 1916 may be gathered from the levy made this year for interest and sinking fund, which, after all deductions resulting from purchase of bonds, saving of interest, etc., were made, amounted to \$4,570,039.06. The net amount will not be less in 1916 and may be more, depending on whether additional bonds will be issued in the meanwhile. On the other hand, there probably will be no considerable increase in taxable property in the meanwhile. The most strenuous efforts to bring to light property which escaped taxation, together with the natural increase, added only about \$19,000,000 to the assessed valuation of property in the city this year. Taking this as a basis for computation and even assuming that there will be no necessity for increasing the levy for interest and sinking fund of bonds, the fact stares the city authorities in the face that at least 42 per cent of all the revenues of the city derived from taxation would have to be applied to the payment of interest and the accumulation of a sinking fund to take care of the outstanding bonds of the city.

In other words, the revenue from taxation will probably not be much more than \$11,000,000, and of this amount at least \$4,600,000 will have to be set aside for interest and sinking funds, since the statute compels the city authorities to provide for same. If there are any additional bond issues ordered in the meanwhile the amount so used will be correspondingly larger.

The full extent of the difficulties which the city under such circumstances would have to meet is not generally appreciated. A comparison of the amount which would in this way be lost to the city with the entire amount of the city's corporate revenues, in itself would demonstrate that there is no way in which the City Council can pare down appropriations

sufficiently to bring them within the revenues. But such a comparison by no means represents the well-nigh insurmountable problem which would confront it by reason of the restrictions placed on the corporate authorities in the handling of the city's finances. We undertake to point out only some of these difficulties in this letter, but what we show is enough to drive home the fact that unless relief is obtained some of the activities of the city will be seriously handicapped if not rendered entirely valueless, while others would have to be abandoned.

Roughly speaking, the revenues of the city, after deducting water rates and vehicle taxes which must be applied to specific purposes, amount to \$11,000,000 from taxation and \$12,000,000 from miscellaneous receipts. The miscellaneous receipts for 1914 ran above this amount on account of an extraordinary payment of the Union Station Company, but otherwise were as stated.

The appropriation bill of 1914 falls far short of including all that is necessary to maintain the various departments and bureaus of the city. A number of additional appropriations had to be made during the year, and two entirely new departments have been provided for that are not even mentioned therein. Yet an examination of that Appropriation Bill will show that even if there could be a horizontal reduction of 20 per cent the expenses of the city could not be met with revenues of approximately \$18,400,000.

But it is principally to show that no such thing as a horizontal reduction is possible that this statement is made. The city has fixed charges, chief among which are its obligations under bonds issued by it, which cannot under any circumstances be reduced. In pointing out some of these in the 1914 appropriation ordinance, we are taking the only figures available, but we believe that the 1916 figures, if they could be foreseen, would in each instance only emphasize the point we make. Based on the 1914 figures, we call attention to the following:

The appropriations for interest and sinking fund for bonds amounted to \$4,770,519, for the Municipal Court \$945,273.30, for the Election Commissioners \$745,208.40, for the

City Council \$212,250, for other statutory officers whose salaries cannot be reduced \$67,000, for interest on tax warrants and judgments \$225,776, for rents \$81,759.75, for Juvenile Court maintenance \$33,250, for taxes on city property \$26,000, for electrical current under contract \$215,000, for rentals of lights and lamps \$318,500, for gas for street lighting \$127,260, for interest to Sanitary District \$125,000, for installment on contract with Sanitary District \$325,639.98.

These items, amounting to \$8,159,186.43, are not nearly all of the charges which are absolutely fixed and cannot by any action of the City Council be reduced. They do not take into consideration contract obligations which are entered into from year to year, running into millions, for coal, feed, fire and police equipment, etc., which are also for practical purposes in the same class and cannot be reduced. Nor do they take into consideration wages of mechanics and laborers which cannot be reduced without the danger of involving the city in labor disputes. Yet when these amounts are deducted, assuming that the remaining appropriations would come within the estimated revenues, we find that even a horizontal reduction of one-third would not be sufficient to overcome the shrinkage of \$4,600,000.

We could go on and show that when the final slash came, in order to bring the expenses of the city within its income, practically the entire reduction would fall on the clerical, inspection, legal, police and fire forces of the city, and that all salaries would have to be cut in half, or that as an alternative the city would have to abandon a large part of its governmental work. We do not believe in piling up figures which, after we have plainly indicated what disastrous consequences might be apprehended, would only tend to predict a situation even more appalling.

If you or any of the members of your committee having in mind the figures we present above, were to examine the appropriations made for the current year in any one of the departments, the utter futility of trying to meet such a condition as impends, would at once be manifest.

For example, the Police Department, with its appropriation of \$7,050,452.60, to which was added a million and a

quarter for constructions and betterments, and to which it is now proposed to add at least another million for additional patrolmen, would be compelled to subsist on four and one-half to five millions of dollars. Again, the Department of Health, where the salaries of only a portion of the employes could be reduced, could not be made to bear its proportionate share of the shrinkage without practically wiping out its efficiency. These and other things could be pointed out in detail if your committee desired further light on this subject.

The above statement must make it clear to you that the Comptroller has drawn your attention to this matter because the legislation he asks for is of vital importance to the city.

We submit herewith draft of the proposed bill which we believe will cover the necessities of the case. You will observe that it simply eliminates the time clause and excludes from the scaling process the levy for the municipal tuberculosis sanitarium. The latter is now excluded by a late statute amending the act creating the sanitarium. The only purpose in putting this in the proposed act is to avoid the possibility of having the new act construed as a later statute which contravenes that provision.

Yours truly,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,
Corporation Counsel.

DECEMBER 29, 1914.

In re EXTENSION OF TIME ON CONTRACT OF E. A. HARDIN.

HON. RAY PALMER,

Commissioner of Gas and Electricity.

Dear Sir:

You referred to this department contract of E. A. Hardin, for the installation of street signs and posts, with papers connected therewith, and asked for an opinion as to the time within which the same should have been performed under the terms of said contract.

We have examined the contract, specifications and the cor-

respondence and memoranda submitted, and find the following state of facts:

The specifications provided that the work of the contractor should be completed and ready for a final inspection and acceptance by the city "within ninety days of the date on which this contract is awarded." The award was undoubtedly made some time between May 11 and May 14, 1914. The contract is dated May 14, 1914, and states that the work shall be commenced as soon as possible, and shall be finished and fully completed "on or before the 14th day of August, A. D. 1914." It will thus be seen that in making out the contract two additional days were conceded to the contractor, the period being three full months instead of ninety days. It appears further that the contractor went ahead with the work and had progressed so far that on July 23, 1914, a payment was made under the contract. The contract was not signed by the Mayor until August 1, 1914, and the contractor did not receive the copy that he was entitled to until that date. The final bill, according to the statement of the contractor, was submitted on October 28, 1914, but, according to the report made in your department, it was not until November 28th that the contractor reported all work finished, and then he continued to do work on the contract until December 12, 1914.

In one sense of the word, the contract is not completed, even at the present time, because the report shows that there were some things which the city had the right to demand under the contract which were not done and which the contractor never finished.

The contractor makes somewhat extravagant claims in a memorandum handed to the writer. He claims, in the first instance, that he waited seventy-six days before the contract was signed up for the city, and that, therefore, he is entitled to an additional seventy-six days beyond the time of signing by the Mayor. He also claims a time credit of twenty-three days for bad weather, and sixty-nine days for "putting the city's material in shape." This would make a total of 244 days which the contractor says he is entitled to in the way of an extension.

We see no ground whatever for the last three items, and

it is only by making a most unusual concession that the extension of seventy-six days for the period between May 14 and August 1 can be allowed. There is nothing in either the specifications or the contract itself which warrants an extension of time merely because the Mayor had not signed the contract. The language is as plain as it can be made in both instruments, and it is perfectly clear that the mere fact that the Mayor did not sign until August 1 did not in any way interfere with the work of the contractor. Nevertheless, we believe you would be justified, under all the circumstances, in making this concession. There is a provision in the contract to the effect that the same shall not be in force and effect or in any way binding upon the city until the same has been countersigned by its Comptroller and approved by its Mayor.

On the assumption that the contractor in some way was hindered from going ahead until the contract was fully executed, you would be justified in extending the time for the completion of same so that a similar period as that mentioned in the contract would elapse after August 1, 1914. This is a period of three months, or, to be more exact, ninety-two days, and expired on November 1, 1914. Beyond that, there seems to be no ground for conceding an extension.

We return herewith copy of contract, letter of the Comptroller and the various memoranda referred to in the above.

Yours very truly,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

BRYAN Y. CRAIG,
Acting Corporation Counsel.

DECEMBER 29, 1914.

In re NECESSITY OF FRONTAGE CONSENTS FOR THE ISSUANCE OF
A PERMIT FOR THE CONSTRUCTION OF A GARAGE TO
BE LOCATED ON AN ALLEY.

HON. HENRY ERICSSON,
Commissioner of Buildings.

Dear Sir:

We have your letter of December 19, 1914, to which is

attached a plat of Block 2 of Walker & Stinson's Subdivision of the West half (W. $\frac{1}{2}$), Southwest quarter (S. W. $\frac{1}{4}$), Section 2-38-14, which is bounded by East 43d street on the North, Drexel boulevard on the East, East 44th street on the South and Cottage Grove avenue on the West. Lots 5 and 6 of a resubdivision of said block are surrounded on all sides by alleys leading to 43d street and 44th street. It is proposed to build a garage on said Lots 5 and 6 and the question submitted by you is, what frontage consents are necessary under the ordinance passed December 7, 1914, and published in the Journal of the Council Proceedings of that date at page 2394.

Said ordinance, after providing for the written consent of a majority of the property owners according to the frontage on both sides of the street as a prerequisite to the building of any garage in the city on any lot in any block in which two-thirds of the buildings on both sides of the street are used exclusively for residence purposes, provides as follows: “ * * * that all lots which abut only on a public alley or court shall be considered as fronting on the street to which such alley or court leads.” It is also provided in said ordinance that the word “block” as used in this section, shall not be held to mean a square, but shall be held to embrace only that part of the street in question which lies between the two nearest intersecting streets.

If two-thirds of the buildings on both sides of 43d street and 44th street to which the alleys abutting the lots in question lead are used exclusively for residence purposes, frontage consents should be required, under the ordinance, from both 43d street and 44th street before a permit is issued to build a garage on said lots. Neither Drexel boulevard nor Cottage Grove avenue are to be considered in this case.

In this connection, we call your attention to the case presented in the block bounded by 52d and 53d streets, Kimbark and Kenwood avenues, which is similar in all respects to the situation presented in your communication of December 19th, hereinabove referred to. On November 11, 1914, we received a protest from property owners in the vicinity of a proposed garage building on premises located on a lot surrounded on all sides by alleys within the block last referred to. We there-

upon wrote you on the same date to hold up the permit for construction of garage until the return of the Corporation Counsel.

As stated in our letter, we had rendered an opinion regarding the subject-matter involved on September 18, 1914, but, in view of the arguments made by counsel for the objectors, we deemed it advisable to give the matter further study. Since that time, on December 7, 1914, ordinances were passed covering the situation and it is no longer necessary to hold up the permit referred to on account of this department. You will, of course, in this case, be governed according to the ordinances recently passed upon this subject-matter.

Respectfully submitted,

JOSEPH F. GROSSMAN,
Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,
Corporation Counsel.

JANUARY 4, 1915.

In re VALIDITY OF ORDINANCE REQUIRING VEHICLES OPERATED
OR USED IN TRANSPORTATION OF PASSENGERS TO BEAR
THE NAMES OF THE OWNERS OF SUCH VEHICLES.

HON. EUGENE H. BLOCK,
Chairman Committee on Local Transportation.

Dear Sir:

In your letter of December 19, 1914, addressed to this department, you state that the Department of Public Service has made a request for an amendment of the Code—

“which will provide that all vehicles operated or used in transportation, or used in transportation of passengers or material within the corporate limits of Chicago shall bear upon both sides the corporate name of the company owning the said vehicle.”

You further state that the Committee on Local Transportation resolved—

“that this matter be sent to the Corporation Counsel to see if there is any reason why these signs should not be placed on the street cars and what rights we have to force the elevated railroads to put signs on their cars.”

Replying thereto, we have to say :

With reference to street railways, the Chicago Railways Company and the Chicago City Railway Company have agreed in the ordinances of February 11, 1907, to comply with all reasonable regulations of the city. (See Sections 10 of the ordinances of February 11, 1907.)

If the City Council passes an order requiring these companies to put signs on their cars and such order is approved by the Board of Supervising Engineers under the provisions of Section 10, then and in such event the companies would be obligated to comply with said order and could not contend that such order was unreasonable. If the Board of Supervising Engineers does not approve such order, the companies have a right in any litigation which might ensue by reason of the failure of the companies to comply with such order, to defend on the ground that the requirement is unreasonable, if this be the fact.

The situation with reference to the elevated lines is somewhat different for the reason that no provisions similar to those contained in Sections 10, above referred to, are contained in any of the grants to the elevated companies. Before the elevated companies can be compelled to place signs on their cars, it will first be necessary for the City Council to pass a general police ordinance.

We fear that an ordinance which singled out elevated roads as the only class of vehicles which should bear the signs might be held to be discriminatory and void. If the elevated lines can be reached at all, they must be reached by an ordinance covering both street and elevated lines. We therefore propose in this communication to consider the question of the validity of an ordinance which requires surface and elevated lines of street railway, used in the transportation of passengers on the streets, highways or public places of the city, to bear upon the sides of said vehicles the name of the owner thereof.

There is no doubt that the city, under the 7th, 9th, 10th, 11th, 15th, 20th and 66th clauses of Section 1, Article V of the Cities and Villages Act, has ample power and authority to control the use of the streets and to pass all reasonable reg-

ulations concerning the use of such streets by all classes of vehicles.

See:

Elliott on Roads and Streets, secs. 1109 and 1112, and cases cited.

28 Cyc. 907.

Christy v. Elliott, 216 Ill. 31.

Hartje v. Moxley, 235 Ill. 164.

Dillon on Mun. Corp., sec. 1166.

Cicero Lumber Co. v. Cicero, 176 Ill. 9.

Fifth Ave. Coach Co. v. New York, 194 N. Y. 19.

Harrison v. Elgin, 53 Ill. App. 452.

People v. James, 16 Hun (N. Y.) 426.

McQuillin on Mun. Corp., sec. 933.

McQuillin on Mun. Corp., sec. 458-464.

City of Chicago v. Collins, 175 Ill. 456.

The courts have gone so far in sustaining the right of municipalities to regulate the use of streets by vehicles, that they have even upheld ordinances prohibiting certain vehicles from public highways which have not complied with ordinance requirements.

McQuillin on Mun. Corp., sec. 936.

Ordinances have been sustained prohibiting vehicles carrying heavy loads from using the public streets of the city unless the vehicles were equipped with tires not less than a certain number of inches in width.

Harrison v. Elgin, *supra*.

People v. James, *supra*.

In *State v. Phillips*, 78 Atl. 283, the court sustained an act of the legislature which prohibited the use of automobiles on the highways of four towns on the Island of Mt. Desert, Maine. (See also, same effect, *State v. Mayo*, 106 Me. 62.)

The case of *City of Chicago v. Kluever*, 257 Ill. 317, is also in point. Here an ordinance of the City of Chicago provided that no motor vehicle engaged in the transportation of passengers, merchandise or any other purpose for hire or reward, shall be driven along any street, alley or public

way in the city, unless the person in charge of such vehicle shall be a licensed operator. The court held the ordinance valid and said, at page 320:

“The seventh clause of section 1 above mentioned empowers the city council ‘to lay out, to establish, open, alter, widen, extend, grade, pave or otherwise improve streets, alleys, avenues, sidewalks, wharves, parks and public grounds, and vacate the same,’ and the ninth clause gives power ‘to regulate the use of the same.’ These are sweeping provisions intended to give very extensive control over streets, and the sixty-sixth clause gives the city council power ‘to regulate the police of the city or village, and pass and enforce all necessary police ordinances.’”

The recent decisions of the Supreme Court in *Koy v. City of Chicago*, 263 Ill. 122, is also in point. In that case the ordinance was somewhat similar to the proposed ordinance now under consideration, in that persons engaged in the business of pasteurizing milk were required to equip their pasteurizing machines with recording thermometers. The recording thermometers were to record on paper dials the temperature reached and sustained by the milk in the process of pasteurization. These dials containing the information as to temperatures reached and sustained by the milk were to be delivered to the Commissioner of Health, who, by inspecting such dials, could ascertain whether or not the milk was properly pasteurized. The court held the ordinance valid.

Ordinances requiring persons to furnish information either to public officials or to the public generally have been sustained in the following cases:

State v. Sherod, 50 L. R. A. 660.

Stolz v. Thompson, 44 Minn. 271.

Palmer v. State, 39 Ohio State Rep. 236.

State v. Aslesen, 50 Minn. 5.

State of Iowa v. Snow, 11 L. R. A. 355.

City of Chicago v. Schmidinger, 243 Ill. 167.

James v. People, 110 Ill. 590.

People v. Henning, 260 Ill. 554.

The best expression of the respect to be paid by the judiciary to legislative enactments is contained in the very

recent case of *Canada Atlantic Trans. Co. et al. v. City of Chicago*, 210 Fed. Rep. 7.

There is no doubt that the city has the power in the interest of the health, safety, comfort and even convenience of the public to pass reasonable regulations affecting vehicles while upon the streets, highways and public places of the city and we are of the opinion that an ordinance requiring surface and elevated lines of railway used for the transportation of passengers to bear the names of the owners of such vehicles while using the streets, highways and public places of the city, has a reasonable connection with the health, safety and welfare of the public and can in all probability be sustained.

Very respectfully,

MAX M. KORSHAK,

Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,

Corporation Counsel.

JANUARY 5, 1915.

In re RAISING OF MONEY TO PAY FOR THE CONSTRUCTION OF
TUNNELS IN ASHLAND AVENUE AND ROBEY STREET.

HON. EUGENE BLOCK,

Chairman Committee on Local Transportation.

Dear Sir:

In your letter of December 17, 1914, you ask us to advise you how long it would take to go through the legal steps necessary to raise the money for the additional cost of construction of tunnels in Ashland avenue and Robey street caused by the proposed enlargement of the tunnels to accommodate pedestrain and vehicular traffic. You speak of raising the money in two ways—(a) by bond issue, and (b) by spécial assessment.

In regard to raising money for the construction of tunnels, to be used for pedestrian and vehicular traffic, by special assessment, we have very grave doubt as to whether this can be done. Money can be raised by special assessment only where the improvement is a local one. An improvement is a

local improvement if the purpose and effect of the improvement is to benefit the locality where the improvement is made, even though there is incidental benefit to the public. On the other hand, if the primary purpose and effect of an improvement is to benefit the public generally, the improvement is not a local one even though it may incidentally benefit property in the locality of the improvement.

While, of course, it is true that the question of what shall be considered a local improvement is committed, in the first instance, to the municipal authorities, nevertheless, the determination of the municipal authorities is subject to review by the courts, and if it appears from the ordinance and the nature of the work that the improvement cannot properly be regarded as a local one, a special assessment cannot be maintained for its construction.

We fear that the courts would hold that the tunnel improvement, referred to in your letter, is a general improvement by which the public at large is benefited, even though it might be shown that in some cases persons in the locality of the improvement likewise receive some benefits. This was the view of the court in the recent case of *City of Waukegan v. De Wolf*, 258 Ill. 374.

By reason of the conclusion herein reached, we find it unnecessary to deal with the question as to the time it would take to raise money for the tunnel construction for pedestrian and vehicular traffic by special assessment.

In regard to the question of raising the money by a bond issue, we beg to inform you that, if it is desired to submit the question to the voters at the next April election, the ordinance authorizing the bond issue should be passed by the City Council not later than January 25, 1915.

Yours truly,

MAX M. KORSHAK,

Assistant Corporation Counsel.

Approved:

BRYAN Y. CRAIG,

Acting Corporation Counsel.

JANUARY 5, 1915.

In re ORDINANCE REQUIRING RAILROAD TRAINS TO STOP AT
STREET RAILWAY CROSSINGS.

HON. EUGENE BLOCK,

Chairman Committee on Local Transportation.

Dear Sir:

In your letter of January 2, 1915, addressed to John W. Beckwith, Corporation Counsel, you refer to our opinion dated December 28, 1914, *in re* validity of an ordinance requiring railroad trains to stop at each grade crossing, and you now ask us to render your committee an opinion as to whether an ordinance can be sustained if made to apply to all crossings of steam railroad tracks with street railway tracks on the theory that the traffic is great wherever street railway tracks exist. Replying thereto we have to say:

As we stated in our letter to you under date of December 28, 1914, it is not so much a question of the power of the city to pass the ordinance as it is the reasonableness of the regulation.

We are of the opinion that an ordinance requiring railroad trains to come to a full stop where the tracks of such railroad trains intersect the tracks of street railways at grade is a reasonable regulation and can in all probabilities be sustained.

We have prepared an ordinance containing such a provision and are transmitting same herewith.

By reason of the conclusion herein reached, we are not answering your letter of January 2, 1915, where you ask us to prepare an ordinance requiring railroad trains to stop at 94th street and Cottage Grove avenue and at 116th street and Michigan avenue. This is in accordance with the suggestion made by you.

Respectfully submitted,

MAX M. KORSHAK,

Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,

Corporation Counsel.

JANUARY 6, 1915.

In re TRANSFERRING JURISDICTION OVER CITY PROPERTY TO
PARK DISTRICTS.

HON. JOHN A. RICHERT,

Chairman, Committee on Finance, City of Chicago.

Dear Sir:

You referred to this department an ordinance introduced on October 5, 1914, and now pending before the Committee on Finance, which contemplates placing certain real estate within the jurisdiction of the Irving Park District for maintenance and improvement as a part of Independence Park, with a request that the matter should be investigated and an opinion furnished to your Committee as to the desirability of passing the ordinance.

The property in question is only a very small tract consisting of three and one-half ($3\frac{1}{2}$) lots, on the opposite side of the alley extending south of the present limits of Independence Park, and all that the city relinquishes by passing the ordinance is municipal jurisdiction over this small plot of ground, so that the municipal corporation known as Irving Park District will have control over it in the same manner as other park districts control the parks within their jurisdiction.

On June 3, 1912 (Council Journal, pp. 620-621), the City Council vacated Dakin street from Hamlin avenue to Springfield avenue, also the east and west alley in the block to the north of Dakin street, and the north 124.86 feet of the north and south alley in the block to the south, so as to leave a rectangular piece of ground for park purposes.

On the same date (Council Journal, pp. 621-622), an ordinance was passed turning over to Irving Park District the control of the lots adjoining the street and alleys vacated. The ordinance passed at that time was substantially the same in terms and wording as the ordinance now before your Committee. The pending ordinance proposes to turn over the municipal control of the small tract mentioned above.

In order that your Committee may understand the exact situation, we have caused to be prepared a rough draft of the property in question, which we forward herewith. You will observe that the property which the park district now

proposes to add to Independence Park does not extend over any street or alley, so that it will only amount to the surrender or relinquishment of municipal jurisdiction and will not affect any of the rights of the city to streets and alleys in that neighborhood.

It has been the custom recently to make a somewhat more extended reservation in matters of this kind owing to the possibility of underground construction that may be entered in the future, but since, as stated above, this small tract does not affect any streets or alleys, we see no reason why the ordinance should not be passed as drafted. The same is in good form and will accomplish the purpose intended. We return said draft of ordinance herewith.

Yours respectfully,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

BRYAN Y. CRAIG,
Acting Corporation Counsel.

JANUARY 7, 1915.

In re DISCRETION OF MAYOR IN ISSUANCE OF SALOON LICENSE.
HON. CARTER H. HARRISON, Mayor.

Dear Sir:

Replying to your request for an opinion in regard to whether you could be mandamused to issue a license to Abraham Halle to keep a dramshop at No. 18 East Twenty-second street, in the event that you refused the application which has been made by Mr. Halle therefor, I beg to say that the premises for which the license is sought are the same premises for which you refused a dramshop license to Ralph Gilblom.

In October Mr. Gilblom applied concurrently for a dramshop license for said premises and for a dance hall license for the dance hall opening off of the saloon premises. Upon your refusal to grant the said licenses, Mr. Gilblom filed two mandamus suits to compel you to issue the licenses. The two suits were tried together and, as you have been heretofore informed, resulted in a dismissal of the petition filed in each suit.

In disposing of the suit for the dramshop license, Judge McGoorty apparently rested his decision on the point that the evidence showed that at the time of the refusal of the application reports had been made to you which were detrimental to Mr. Gilblom's character and that you were not satisfied that he was a man of good character, and further that you justifiably considered the concurrent applications for a dramshop license and dance hall license as one proposition, that is, that you considered the saloon on the basis that it was intended to be conducted in connection with the proposed dance hall, and that under these circumstances he (Judge McGoorty) could not say that there had been any abuse of the discretion lodged in you as mayor in the matter of granting or refusing to grant the license in question.

The reports in regard to the present applicant, Mr. Halle, indicate that he is a man of good character. The application made by him is for a dramshop license only. No application is made for a dance hall license. The two matters, namely, the questionable character of the applicant and the fact of the application being for a dramshop to be run in conjunction with a dance hall, which were present in the matter of the Gilblom application, and which were the basis of the court's refusal to grant his petition for mandamus, are entirely lacking in the matter of the present application.

Mr. Halle's application is accompanied by a writing signed by him, stating that he will accept the license under any restrictions which you might grant, and also under all the regulations and conditions which you have placed upon the Cadillac and the W. W. Catering Company.

I understand that the regulations and conditions placed by you upon the Cadillac and the W. W. Catering Company include the provision that the saloon shall be operated for men only, and that no women shall be allowed in the place and also that certain entrances to the saloon be closed.

A number of saloons are operated in close proximity to the premises referred to in the Halle application and therefore an application for a license to keep a dramshop in these particular premises cannot lawfully be refused by you on account of the general conditions obtaining in that locality,

unless there are warranting circumstances peculiar to the proposed dramshop and which would distinguish it from other dramshops in that locality.

While you undoubtedly have a discretion in the matter of granting or refusing a dramshop license, such discretion must be reasonably and fairly exercised. An application for such a license cannot be refused arbitrarily or capriciously. When an application for a dramshop license is refused there should be information before you affording a reasonable basis for the refusing of the application, in order to present a case of reasonable exercise of the discretion vested in you in the matter of granting or refusing such application.

If you should refuse the Halle application for a dramshop license under the circumstances above referred to and he should file a petition for mandamus to compel the issuance of the license, I fear that the suit could not be successfully defended against.

Yours respectfully,

BRYAN Y. CRAIG,
First Assistant Corporation Counsel.

JANUARY 11, 1915.

In re CITY ASSUMING RISK ON BONDS OF ITS OFFICERS AND
EMPLOYEES.

HON. JOHN A. RICHERT,

Chairman Committee on Finance, City of Chicago.

Dear Sir:

You referred to this department a request of your Committee for an opinion as to whether, in the event that the city bonds its own employes, it can bond officers where statutes and city ordinances require bonds.

In our opinion it would be contrary to the statutes for the city to act as surety or assume the risk in any case where an office is created by statute, or by ordinance in the manner prescribed by statute.

Section 4 of Article VI of the Cities and Villages Act requires that all officers, except aldermen, shall, before entering upon the duties of their respective offices, execute a bond with surety to be approved by the City Council, payable to the

city, in such penal sum as may, by resolution or ordinance, be directed, conditioned for the faithful performance of the duties of the office and the payment of all moneys received by such officer, according to law and the ordinances of the city.

This provision of the statute is mandatory and cannot be ignored or circumvented by any measure which in effect causes the city to assume the risk.

There is an additional provision in the statutes, regarding official bonds of city officers and employes, which appears as Section 6 of Part 2 of the Act concerning the City of Chicago, sometimes called "the little charter." This authorizes the City Council to fix the amount and penalty of the bonds of all city officers and municipal employes charged with the custody of money or property, and gives the City Council power to require the giving of additional bonds and to increase or decrease the amount and penalty, and to require a new bond where the security on an original bond has become either insufficient or impaired upon penalty of removal from office.

We do not regard this additional provision as a limitation or modification of the provision in the original act mentioned above, but rather as giving the City Council additional powers in regard to these bonds, which otherwise might have been construed as insufficiently provided for under the statute relating to official bonds passed in 1874, and amended in 1879.

The requirement of the statute, therefore, is that officers shall give bonds for the purpose of protecting the city against loss and guaranteeing the faithful performance of the duties by the officer. This includes such officers as are created by ordinance, as well as those that are specifically named in the statutes.

As to bonds of employes or subordinates in the various departments of the city government, some of them run to the city and are conditioned for the faithful performance of the duties of the person holding the position, others run to the head of the department and are designed to protect the latter from loss through the delinquency of a subordinate. If the city were to make good any loss suffered by the head of a department through the delinquency of an employe such as-

sumption of the risk would amount to an evasion of the statute, for it would place the loss upon the city instead of upon the officer who is expressly required by statute to give a bond to the city to insure it against loss. If the city assumed the risk in a case where the bond of an employe who is not an officer runs to the city that would amount to nullifying the provision requiring a bond.

The City Council, under the clause delegating to it power "to provide by ordinance in regard to the relation between all the officers and employes of the corporation in respect to each other, the corporation and the people," may have authority to establish an insurance fund and to provide for the bonding of employes that are not officers whose bonds run to the city, and authority to draw on such fund to make good losses to the city that would otherwise be paid by surety companies or bondsmen. But in no case would it authorize the city to make good to his superior officer a loss which the latter sustained through the delinquency of an employe whose bond runs to such superior officer.

The matter of bonding any employes in the manner proposed at best is of doubtful validity. There are questions relating to appropriations for such purpose and the custody and conservation of such fund that may come up, even though such questions may be regarded as remote.

Under the circumstances, therefore, we recommend that the proper way of carrying out such a plan as is proposed would be through legislative action authorizing the establishment of an insurance fund and the bonding of officers and employes of cities. To the limited extent that the plan could be entered into by the bonding of employes who are not officers and whose bonds run to the city, we see no objection to undertaking it before legislative action is secured, since that, as stated above, in its last analysis amounts to doing away with the bond, which the City Council has a right to do.

Yours respectfully,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,
Corporation Counsel.

JANUARY 11, 1915.

In re FRONTAGE CONSENTS FOR MUNICIPAL HOSPITAL.
TO THE HONORABLE THE CITY COUNCIL OF THE
CITY OF CHICAGO.

Gentlemen :

On January 4, 1915, (see page 2717, Journal of Council Proceedings), your honorable body directed the Corporation Counsel to render an opinion as to whether it is necessary for The Municipal Tuberculosis Sanitarium to procure frontage consents for the operation of a medical dispensary at 4319-23 Indiana avenue.

Section 712 of The Chicago Code of 1911, as amended May 26, 1913 (Journal of Council Proceedings, page 659-60) provides in part as follows:

“It shall be unlawful for any person, firm or corporation to locate, build, construct, or maintain on any lot fronting on any street or alley in the city in any block in which one-half of the buildings on both sides of the street are used exclusively for residence purposes, or within fifty feet of any such street, any building or place used for * * * a medical dispensary * * * without the written consent of the majority of the property owners according to frontage on both sides of such street or alley.”

The 77th clause of Section I of Article V of the Cities and Villages Act expressly gives power to the city “to erect and establish hospitals and medical dispensaries.”

Dillon on Municipal Corporations, Section 976, gives many illustrations where it is necessary to purchase sites and erect buildings for municipal purposes in order to carry out these powers, such as buildings for engine houses, hospitals, etc.

It has been held by our courts that the establishment of a hospital is one of the police powers of the City of Chicago. *Frazer v. City of Chicago*, 186 Ill. 480. A medical dispensary being in its scope similar to that of a hospital, I am of the opinion that such a dispensary conducted as a branch of The Municipal Tuberculosis Sanitarium of the City of Chicago, would likewise be within the police power of the city, and the city, in establishing such a dispensary, is acting in its governmental capacity as distinguished from its private capacity.

Ordnanances requiring frontage consents do not apply in such cases.

The City Council on July 2, 1914, page 1195, Journal of Council Proceedings of that date, authorized the Board of Directors of The Municipal Tuberculosis Sanitarium to purchase said property at 4319-23 Indiana avenue for use as a site for a central south side dispensary.

The City Council further, on January 4, 1915 (see Council Journal, page 2717) approved the plans for the said dispensary building.

The City Council having purchased said property for the aforesaid purpose and having likewise duly authorized the erection of the said building to be used for such purpose, I am of the opinion that frontage consents are unnecessary.

Yours very truly,

LOUIS SALINGER,
Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,
Corporation Counsel.

JANUARY 11, 1915.

In re EXTENSION OF TIME OF PAYMENT ON CONTRACT FOR DRY
GARBAGE.

HON. JOHN A. RICHERT,
Chairman Committee on Finance.

Dear Sir:

You referred to this department a letter from the Commissioner of Health relative to a request made by Harris Brothers Company, who have the contract for dry garbage produced at the Municipal Reduction Plant. Accompanying said letter of the Commissioner of Health is one from Harris Brothers Company and one from Heller, Hirsh & Co., concerning the market conditions that confront the contractor.

The gist of this correspondence is that, by reason of the extraordinary conditions brought on by the European war, the contractor desires an extension of time for the payment of approximately \$60,000 until May 1, 1915.

It is represented, on behalf of the contracting company,

that it was compelled to construct a plant at an expense of over \$100,000 in order to take care of the dry garbage produced by the operation of the municipal plant, and that it had no sooner entered into the business than, by reason of the conditions brought on by the war, the demand for the product of this plant fell off to such an extent as to prevent the disposition of same to advantage. It is further represented that the prices on grease, tankage and fertilizer are now so low that the contractor is suffering a great loss.

The representatives of this company understand clearly that it cannot escape the consequences of this situation, and that the condition that has arisen is one of the chances that was taken when the contract was entered into. The request is, therefore, addressed solely to the point whether the City Council would be inclined to make some concession as to the time in which the payments are to be made in view of the unexpected happenings of the last few months.

There is nothing in the law which will prevent the City Council from making such a concession if it sees fit to do so. The only thing that would have to be taken into consideration is the fact that the sureties of the contractor have some rights in this matter, and their consent would have to be obtained if such an extension is granted; otherwise, the City Council is acting entirely within its rights in deferring the date of payment of a portion of the contract as requested in the letter of the contractor.

It is generally conceded that immaterial modifications may be made on a contract by the City Council if there is an equitable basis for same. This is true even if let by competitive bids.

28 Cyc. 683.

Thus, it has been held that the City Council may waive a forfeiture incurred by the contractor failing to complete a contract within the specified time.

People v. Brennan, 18 Abb. Prac. 100.

Buckman v. Lauders, 111 Cal. 347.

Jenkins v. Stetler, 118 Ind. 275.

The extension of the time of payment is such an immaterial

modification as the City Council is warranted in making if the circumstances justify it. It would necessarily have to be done by Council order, and such order should be passed only after the written consent of the contractor's surety to such extension is obtained.

You have also requested that we ascertain, if possible, whether this contract has been assigned.

In pursuance of this request we have caused an investigation to be made, and find that the actual operations are conducted by a company organized for the purpose known as Felro Co., that the plant is located in the rear of Sulzberger's Packing House at about Hermitage avenue and Forty-second street, that it was started about September 1, 1914, and has been finished only recently, that the ground on which it is located is leased from the Chicago Junction Railway to the Felro Co. This company keeps books of account and the payroll of the plant is paid by the company.

The writer had a talk with Mr. Harry F. Baum, representing the Harris Brothers Company. The latter stated that there was absolutely no ground for any suspicion that the contract had been assigned. He said that the main business of the Harris Brothers Company was of such a nature that it was not deemed advisable to advertise on their stationery and the literature distributed by them the fact that they were rendering dry garbage into grease and fertilizer—that it would not add to their sales as a mail order concern or as a merchandising plant if they gave notice of this branch of their business and that it might create the impression that the reduction plant was in operation at or near their salesrooms and injure their business.

Mr. Baum further said that the organization of the Felro Co. was merely a matter of expediency, that the company was owned by Harris Brothers and Sulzberger, that they had constructed their own plant at a great expense and that it was operated under their own supervision. He also stated that while the matter of granting an extension of time for payment was under consideration he had forwarded the check of the Harris Brothers Company for \$11,000 to the city, such amount having fallen due during that time, in order

that there should be no question as to the intention of the Harris Brothers Company to live up to its contract.

The position of the Harris Brothers Company seems to be that they regard the Felro Co. as simply an instrument for their own convenience, that is to say, a subsidiary company organized by them simply for the purpose of carrying out their agreement with the city.

We return herewith the letters of the Commissioner of Health, Harris Brothers Company and Heller, Hirsh & Co., mentioned above.

Yours truly,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,
Corporation Counsel.

JANUARY 11, 1915.

In re ANNEXATION OF PORTION OF CITY OF EVANSTON.
TO THE HONORABLE, THE CITY COUNCIL OF THE
CITY OF CHICAGO.

Gentlemen:

On December 14, 1914, your honorable body directed the Comptroller and the Corporation Counsel to take up the question of the adjustment of all revenue matters relating to the annexation of the territory of the City of Evanston lying south of Calvary cemetery and east of the right of way of the Chicago, Evanston & Lake Superior Railway Company, including questions of indebtedness and taxation, with the municipal officers of the City of Evanston, for the purpose of arriving at an adjustment in the matter, and to report the same to the City Council as soon as practicable.

Acting in pursuance of the direction contained in the said order, we have undertaken to arrive at such an adjustment as is contemplated by the statute in such cases; but we found that the final determination of this matter must rest with the corporate authorities involved and cannot be consummated by even a tentative arrangement so far as the Comptroller and the Corporation Counsel of this city are con-

cerned. We apprehend that the officers of the City of Evanston would be in practically the same situation if the figures we submit herewith were presented to them.

We stated in the letter transmitting the ordinance providing for annexation that the statute contemplated that annexation should be affected by consent of the City Council of Evanston and by an ordinance of the City of Chicago annexing the territory, passed in pursuance of such consent, and that the adjustment of revenue matters, including property rights, questions of indebtedness and tax matters, between the municipalities affected, would then proceed in accordance with the provisions of the statute, and, if an adjustment could not be arrived at, the Circuit or County Court could be appealed to; and we called attention to the fact that the ordinance of the City of Evanston giving consent presented difficulties to be overcome which would not arise if the statute had been strictly followed and unconditional consent had been given. At the same time we stated that these difficulties were not of such a nature as to interpose an insuperable obstacle to annexation. We had in mind the difficulty that would be met in agreeing on an adjustment which will be satisfactory to all parties before annexation was effected, a difficulty that would not be met in case annexation was effected and the adjustment contemplated by statute then arranged.

We present herewith figures which we arrived at by a strict observance of the provisions of the statute, and it now remains for the City Council to arrive at an understanding based on these figures.

Section 8 of the Act of 1889, which prescribes the manner in which the adjustment should be made in such a case as this, provides that the proportionate share of any indebtedness, contract or liability of the City of Evanston, according to the taxable property in the territory to be disconnected as the same existed immediately before annexation, and the proportionate share of such indebtedness of any school district or township involved, shall be assumed and paid by the City of Chicago, and, on the other hand, the City of Chicago shall be vested with the title and ownership of all public and school property in the annexed territory and shall be en-

titled to a division of the public property of the City of Evanston and any such school district or township in the same proportion, subject to such reduction as may be made on account of public property situated in the territory. The City of Chicago of course, in making such adjustment would divide the liability or property received, as the case may be, between the city as a corporation and the city as trustee for the schools.

Upon inquiry, we found that there was no public property located in the territory which it is proposed to annex. We also found that the City of Evanston and the school districts involved had a considerable amount of property, cash and rights to uncollected taxes, over and above all indebtedness existing at the present time. It necessarily follows that if the method prescribed in the statute for adjusting these matters is pursued, the City of Evanston and these school districts will have to pay to the City of Chicago and the board of education the share to which this territory would be entitled.

We have figured out the amounts so due, but we do not feel at liberty to make any proposition to the officers of the City of Evanston or the officers of the school districts involved which is not based on the precise amount estimated in each case as the value of the property which this territory is entitled to. On the other hand, provision is made in the statute for an adjustment by the corporate authorities by agreement, provided that each shall pass an ordinance or resolution reciting the amount thereof to be paid, which resolution duly certified in each case would afterwards be filed with the county clerk and the same would be final and conclusive.

The computation was made by Messrs. H. G. Westphaln and C. F. Williams, accountants of the Comptroller's office, on the basis of assessed valuation of the year 1914.

These accountants procured their balance sheet for the City of Evanston from the trial balance of that city of November 30, 1914. They included the present worth of interest and bonds which are unpaid and not yet due. They also included the 1914 taxes certified for collection. The real estate was taken at the book figure, which is based on the ap-

praisal of 1901. An appraisal at this time would probably exceed those figures.

The valuation of the Evanston Township High School was taken from a report made by its secretary to the Department of the Interior under date of June 30, 1914. The valuation of the property of School District No. 76 was made by the appraisal of the secretary of this district which he had made previously for the School Board of said district. The figures for school buildings and furniture were made in an appraisal of 1908, excepting one school, recently completed, for which the cost was taken as the value.

The difference between the figures presented and the figures as of the day of annexation may be computed if it is deemed advisable to narrow down the figures to the exact date. If that is to be done, there will also have to be some allowance made with relation to cash on hand which necessarily varies from time to time and may show considerable difference from the balance sheet of December 1, 1914. Therefore, if the exact figures are to be computed as of the day of annexation there will necessarily have to be some changes.

It was found by the accountants that the entire taxable property of the City of Evanston, according to the assessed valuation of 1913, including real estate, personal property and railroad property, was \$12,983,426.00; that the entire taxable property in the district to be annexed to Chicago was \$172,524.85, and that therefore this territory was to be credited with 1.3288 per cent of the net assets of the City of Evanston. The Evanston Township High School district is co-extensive with the City of Evanston, and therefore the figures for this high school district are the same as for the city, and the same percentage of the high school districts's net assets belong to the territory to be annexed and would be due to the Board of Education of the City of Chicago, if these figures are to be taken as a basis of the agreement between the municipalities. The accountants also found that the entire taxable property of school district No. 76, according to the assessed valuations of 1914, including real estate, personal and railroad property, was \$3,569,362.00; that the entire taxable property in the district to be annexed to Chicago, which is located in said

school district No. 76, was \$172,524.85, as above stated, and that, therefore, this territory was to be credited with 4.8335 per cent of the net assets of school district No. 76, and the same would be due to the Board of Education of the City of Chicago, if these figures are to be taken as the basis of the agreement between the municipalities.

The accountants found that the assets of the City of Evanston as of December 1, 1914, including taxes certified for collection but not yet collected, amounted to \$1,645,826.04, and that the proportion due the territory in question was \$21,869.87. As against this, they found that the liabilities of the City of Evanston for bonds and interest figured at present worth, were \$325,796.03, and its other liabilities amount to \$137,569.31, of which the proportion to be charged to this territory was \$4,320.20 and \$1,828.03, respectively, leaving a net balance in favor of this territory of \$15,712.64.

It was next found that the assets of the Evanston Township High School District as of December 1, 1914, including taxes certified for collection but not yet collected, amounted to \$294,139.39 and that the proportion due this territory was \$3,908.52. As against this the liability of said district for bonds' outstanding and interest on same amounted to \$6,105.00, of which the proportion to be charged to this territory was \$81.12, leaving a net balance in favor of this territory of \$3,827.40.

The accountants next found that the assets of School District No. 76 as of January 4, 1915, including taxes certified for collection but not yet collected, amounted to \$390,689.00, and that the proportion due this territory was \$18,883.92. As against this they found that the liabilities of the said district for bonds and interest were \$144,500.00 and \$70,278.75, respectively, which, figured at present worth, amount to \$168,352.56, of which the proportion to be charged to this territory was \$8,137.31, leaving a net balance in favor of this territory of \$10,746.61.

The adjustment if made in strict accordance with the statute, therefore, would be as follows:

That the City of Evanston should pay the City of Chicago the sum of \$15,712.64; that the Evanston Township High

School District should pay the Chicago Board of Education \$3,827.40, and that School District No. 76 should pay the Chicago Board of Education \$10,746.61. The total amount from all three of these corporate authorities would, therefore, be \$30,286.65. In order that the committee which has the matter in charge may fully understand the figures we present, we transmit herewith a schedule of assessed valuations of 1914 for the City of Evanston, School District No. 76, and the Evanston Township High School District, and three balance sheets covering the matters set forth above. The details in regard to same are in the possession of the accountants and can be examined by the committee whenever called for.

For the purpose of enabling the committee to take the next step towards annexation, we have prepared and forward herewith an ordinance agreeing to such adjustment, for submission to the City Council of the City of Chicago, and a similar ordinance for submission to the City Council of the City of Evanston, also resolutions agreeing to such adjustment to be submitted respectively to the Board of Education of the City of Chicago, the Board of Trustees of the Evanston Township High School District and the Board of Trustees of School District No. 76. If, after consideration of the matter, it is decided that the figures in the said ordinances and resolutions shall be altered, to make same exact as of the date of annexation, that can readily be done.

While the status of the situation is such that it is possible for annexation to proceed without the school trustees taking action in advance, nevertheless, we consider it safer to follow this rule because under the statute any one of these bodies, or, in fact, even a taxpayer, might bring the matter into court for adjustment if not finally agreed upon.

We have caused additional copies of this letter to be prepared, which can be submitted to the various corporate authorities along with the ordinance or resolutions, as the case may be, so that the position of the city with respect to this adjustment may be fully understood by each of said parties.

You will observe that in each of the ordinances and resolutions we have made provision for the payment of one-twelfth of the taxes of 1915 collected in the said territory to be paid

to the corporate bodies in which the same is now located. This is so fixed on the theory that annexation will take place about February 1, 1915. This particular feature of the agreement may be subject to further adjustment on account of the uncertainty of the date of annexation and on account of the possibility of the fiscal years of the various taxing bodies not coinciding. You will readily see that these ordinances and resolutions are necessarily tentative, because we cannot fix all these matters precisely until the various corporate authorities are ready to take action. They can, however, be changed to meet the situation on a moment's notice.

So far as we have been able to ascertain, there is only one contract which will have to be assumed by the city in connection with this annexation, and that is a contract for street lighting, with the Public Service Company of Northern Illinois, which still has a period of five or six years to run. Information at hand indicates that this contract is advantageous to the city and will not result in a loss to it if carried out.

In case the ordinances and resolutions which we submit herewith are passed by the various corporate authorities for which they were prepared, the City Council of the City of Chicago will be ready to pass the annexation ordinance which is now pending.

A limitation of ninety days was placed on acceptance by the city in the ordinance consenting to annexation passed by the City Council of the City of Evanston. That ordinance was passed on November 17, 1914; consequently final action annexing this territory will have to be taken by the City Council of the City of Chicago before February 15, 1915, otherwise the matter will lapse. In order to be effective, the annexation ordinance must be passed by a vote of two-thirds of the City Council.

In case the annexation ordinance is passed, all matters relating to future taxations will be adjusted through the medium of the county clerk and the State Auditor of Public Accounts. The various corporate authorities will submit and file with the county clerk copies of the ordinances and resolutions passed by them, and the county clerk will thereupon

certify same to the State Auditor of Public Accounts and will thereafter extend the taxes in the annexed territory in accordance with the new order of things.

So far as local improvements are concerned, the statute takes care absolutely of same and there is no necessity for action on the part of your honorable body.

Yours respectfully,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,
Corporation Counsel.

January 12, 1915.

In re TELEPHONE CANCELTION CHARGE WHEN UNABLE TO
SUPPLY SERVICE ON A REMOVAL ORDER.

HON. MONTAGUE FERRY, Commissioner Public Service.

Dear Sir:

Your inquiry of the 7th inst., relative to the complaint of a telephone subscriber against the cancelation charge made by the Telephone Company, where said subscriber requested the removal of his telephone to an address at which facilities for service are not provided, is at hand.

The amount charged by the Telephone Company in lieu of the cancelation charge is proper in the event said company, under the circumstances, is entitled to make any charge. There being no obligation on the part of the Telephone Company to install new service at the location to which this subscriber desired his telephone moved, there is likewise no obligation to furnish such service on a removal order.

We are of the opinion that a subscriber is only entitled to receive service at a new address on a removal order in such locality as the Telephone Company is obliged to furnish new service, and we do not consider that a present subscriber can evade the conditions of his contract with the Telephone Company by ordering his telephone moved to other than such a location. The obligation assumed by the Telephone Company is to furnish such a subscriber service at any locality

in the City of Chicago where the company at such time is furnishing others service.

We assume from your letter that the Telephone Company is not at the present time furnishing any class of service at the location at which the subscriber desires to have his telephone removed. In the event the company is furnishing service in said locality, but its facilities at such place are so limited that it is unable to supply the additional service, then said company would not, in our opinion, be entitled to make any charge for cancelation, provided such subscriber is willing to take and pay for such service for the unexpired portion of his contract if said company furnishes service at the new address within a year from the date of the making of the contract with the subscriber.

Very truly yours,

LORING R. HOOVER,
Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,
Corporation Counsel.

January 13, 1915.

In re DAMAGES TO PERSONAL PROPERTY BY BULLETS FIRED BY
POLICEMEN.

HON. JOHN A. RICHERT, Chairman Committee on Finance.

Dear Sir:

In answer to your communication of the 2d inst., transmitting statement of claim of Mrs. Carrie Robinson and council order of reference to the Committee on Finance, requesting the corporation counsel for an opinion in the matter, we beg leave to say:

It appears by the claimant's statement that on August 17th last she resided in the second flat at 3800 State street and was the owner of the furniture and contents thereof; that on said date one Simon Hogan, fugitive charged with murder and not a relative of claimant and without her consent and against her protest took refuge therein; that claimant at once left her apartment and notified the police of said Hogan's whereabouts; that the police officers "laid siege"

to the place to capture Hogan and that bullets fired by the police officers damaged and partly destroyed her household effects to the amount of about \$150. Indeed, claimant's itemized statement accompanying her petition would indicate that the furniture and fittings of her home were practically demolished.

Messrs. Becker and Teeling of this department have investigated the damages and say in a written report thereof: "The prices quoted in the petition are very much exaggerated, as goods are all of much cheaper quality and all have the appearance of long service. We believe \$25 would be a fair compensation for the damages caused by the Police Department."

It is undisputably the law that in cases of the foregoing narrated character the doctrine *respondeat superior* does not apply and the city is in nowise liable for the acts of its policemen.

Dillon on Mun. Corp., 5th Ed., Sec. 1656.

Blake v. Pontiac, 49 App. 553 (this case is frequently cited by the Supreme Court).

Craig v. Charleston, 180 Ill. 164.

Tollefson v. Ottawa, 228 Ill. 134.

Evans v. Kankakee, 231 Ill. 237.

The facts, however, in the premises we think constitute equities in favor of the claimant which will justify the City Council in taking such action as it may deem proper.

We herewith return council order and statement of claim.

Yours very truly,

GEORGE B. O'REILLY,
Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,
Corporation Counsel.

January 15, 1915.

In re MATTER OF COLLECTION OF DAMAGES, BY REASON OF
ELECTROLYSIS, FROM TRACTION COMPANIES UNDER
UNIFICATION ORDINANCE.

HON. RAY PALMER, Commissioner of Gas and Electricity, City
of Chicago.

Dear Sir:

In your letter of October 24, 1914, addressed to us, you ask to be advised in what manner damage done by stray currents from the surface lines can be collected, which has been incurred either prior to the passage of the ordinance of November 13, 1913, or two years thereafter. Replying thereto, we have to say:

The only provision in the ordinance of November 13, 1913, which treats of the liability of the surface companies by reason of electrolysis, is contained in clause (f), section 8.

Said clause (f) of said section 8 (copied from the original ordinance passed by the Council and now on file in the office of the City Clerk), provides as follows:

“(f) For the purpose of ascertaining any damage by stray electrical currents caused by: first, connections with pipes or other underground metallic work of the City of Chicago or The Sanitary District of Chicago as authorized by clause (b) of this section; and, second, the operation of the companies, or any of them, to any property of the City of Chicago or the Sanitary District of Chicago after the period provided by clause (d) of this section for electrical rehabilitation, and for the purpose of determining the amount of any damage, and if the companies, or any of them, is or are responsible therefor, there is hereby created a board, which shall be known as the ‘Board of Electrolysis Claims,’ and shall consist of three members, one of whom shall be the City Electrician and the second the Chairman of the Board of Supervising Engineers, and the third an engineer appointed by the companies.”

(The period referred to in the above provision as “the period provided by clause (d) of this section for electrical rehabilitation” is the period of two years from and after the date of the passage of the unification ordinance ending November 13, 1915. Said clause (d) of said section 8 provides

that all of the electrolysis provisions shall be complied with during said period of two years ending on said November 13, 1915, and that the companies shall expend not less than one million dollars (\$1,000,000) therefor.)

You will note that under the foregoing ordinance a "Board of Electrolysis Claims" is created for the purpose:

(A) "of ascertaining any damage by stray electrical currents caused by:

"first, connections with pipes or other underground metallic work * * * and,

"second, the operation of the companies * * *"

after the two-year period mentioned hereinbefore, or after November 13, 1915, and

(B) "of determining the amount of any damage, and if the companies, or any of them, is or are responsible therefor. * * *"

While under "B" it was made the duty of the "Board of Electrolysis Claims" to *determine* "the amount of *any* damage," and the responsibility of the companies therefor, under "A" it is made the duty of the Board to *ascertain* damages by stray electrical currents caused by connections and operation of the companies after November 13, 1915.

The question arises whether the words "any damage" contained in "B" empower the Board to determine and award damages caused by stray electrical currents regardless of when such damages occurred, or do the words "any damage" refer and relate to the particular damage provided for under clause "A," to wit, damages caused by connection with pipes or other underground metallic work and the operation of the companies after November 13, 1915. If the words "any damage" contained in clause "B" relate back and refer to the particular damages enumerated under clause "A," then the Board will have the power to ascertain and determine only the damage caused by connections with pipes or other underground metallic work, and the operation of the companies after November 13, 1915. In such event the Board would have no right to allow compensation for damage which occurred prior to November 13, 1915.

We are informed that the damage done by stray electrical

currents to pipes and underground metallic work may be slow and gradual, or it may at times develop suddenly and rapidly. The stray currents operate upon metallic property underground in such a way that when damage is discovered it is a physical impossibility to state when the damage began and when it ended.

We are told that when a large leak in a water main is discovered, it is as much an impossibility to determine the damage done by electrolysis after a fixed point of time as it would be to determine the damage done by a fire to a building after a fixed hour, when such building had been burning for several days.

If, then, it is an impossibility to determine how much of a given damage, attributable to electrolysis, was done before and how much after a given date, a construction limiting the inquiry of the Board to determining damages which occurred after November 13, 1915, should be avoided as unreasonable, if the language used is susceptible of another and more reasonable meaning.

Strained and forced constructions are never permitted, and where an ordinance is open to two constructions—one which makes it sensible, and the other absurd—it is the duty of the court to adopt the construction which gives the ordinance a sensible meaning.

Harding v. R. R. Co., 65 Ill. 90.

Loverin v. McLaughlin, 161 Ill. 417.

People v. Harrison, 191 Ill. 257.

People v. Willison, 237 Ill. 584.

Chicago City Ry. Co. v. Martincic, 138 Ill. App. 575.

We believe that the more reasonable construction is to consider the words “*any damage*” independent of and not related to the damage referred to under clause “A.” Under such a construction, the Board would not be required to perform duties which are impossible of performance. Under this construction the Board would be empowered to determine and award compensation for damage done by electrical currents, after the unification ordinance of November 13, 1913, becomes effective, in every case submitted to it, regardless of when such damages had occurred.

This last construction is in consonance with the provisions contained under clause "A." Under the ordinance, the installation of the drainage system for preventing damage by electrolysis was to be done under the supervision of the Board of Supervising Engineers. The Board of Supervising Engineers were not only to have supervision over the installation of the drainage system to prevent damage by electrolysis during the two-year period, but after said two-year period and during the entire life of the ordinance.

It is fair to assume that the "Board of Electrolysis Claims" would be in a position to secure much needed information as to the efficiency of the system authorized by the ordinance, and for this reason the "Board of Electrolysis Claims" was not only charged with the duty of "*determining*" damages, but of "*ascertaining*" the damage, if any, which might occur after November 13, 1915.

This information obtained by such an expert body as the "Board of Electrolysis Claims" would be of considerable benefit to the Board of Supervising Engineers in the preventing of damage by stray currents, after the two-year rehabilitation period had expired. It may reasonably be supposed that the City Council had this in mind, and for this reason imposed upon the "Board of Electrolysis Claims" the duty of "*ascertaining*" the damage which might occur after November 13, 1915, by stray electrical currents.

Furthermore, it is to be observed, the provisions for preventing damage by electrolysis were inserted, we are informed, at the suggestion of the companies, and were opposed by some of the city officials, who contended that the scheme championed by the companies was not practicable and would not accomplish the results claimed for it by the companies. It is reasonable to suppose that the Council had this situation in mind and charged the "Board of Electrolysis Claims" with the duty of ascertaining what damage, if any, would be occasioned by stray currents after November 13, 1915, for the purpose of determining whether the companies' system for preventing or minimizing damage by electrolysis (which system would by November 13, 1915, be completely installed) had in fact proved effective.

We are of the opinion, therefore, by reason of the foregoing, that the "Board of Electrolysis Claims" is not limited in its inquiry to ascertaining and determining the amount of and responsibility for those damages only which occur after November 13, 1915, but said Board is empowered under the ordinances to determine and award damages for claims submitted to it regardless of when such damages occurred, and it is not necessary for the "Board of Electrolysis Claims" to wait until November 13, 1915, before beginning to carry out the duties imposed upon it by the ordinance. Said Board is created by the ordinance of November 13, 1913, and it was entitled to begin the performance of its duties as soon as said ordinance became effective.

If there are any matters which should now be considered by the "Board of Electrolysis Claims," the Board may be organized at once, and you being the first individual named on said Board under the ordinance, have a right to call a meeting of the "Board of Electrolysis Claims" for the purpose of organization.

Yours very truly,

MAX M. KORSHAK,
Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,
Corporation Counsel.

January 15, 1915.

In re CONSIDERING CORNERS ON FRONTAGE CONSENTS.

JOHN C. McDONNELL, Chief, Bureau of Fire Prevention and
Public Safety.

Dear Sir:

We acknowledge receipt of your communication of January 7, 1915, to this department. An opinion is requested as to whether or not the sides of corner lots are to be taken into consideration on frontage propositions under section 245, page 130, of the fire prevention ordinance, which reads in part as follows:

* * * "Provided, that whenever application is made to construct any such tank or tanks in any block or square in which two-thirds of the property according

to frontage on both sides of the street is used exclusively for residence purposes, such application shall be accompanied by the written consent of a majority of the property owners according to frontage in such block or square, before a permit shall issue." * * *

We find no decision interpreting similar clauses of frontage consent ordinances, but reasoning to it by analogy on the question as to what constitutes a frontage to corner lots in the matter of special assessments, we find many decisions which state that a corner lot faces or fronts on two streets.

It is stated in the case of *People v. Adams*, 1892 (45 N. Y. State Reporter 270, on page 271) :

"A corner lot faces or fronts on two streets; it has a frontage on both streets, though the house built upon it may have its principal door for egress and ingress facing only one street."

To the same effect is the case of *Des Moines v. Dorr*, 31 Iowa 93, also the case of the *City of Springfield v. Green*, 120 Ill. 269, on page 274, throws considerable light upon the consideration and interpretation of special assessment ordinances on corner lots.

Therefore, we are of the opinion, in view of the law as above stated, that in computing the number of feet in frontage consent matters, the sides of corner lots as well as the front of same must be considered and counted separately.

We are returning with this opinion plat which you forwarded in this matter.

Yours truly,

M. W. CAGNEY,
Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,
Corporation Counsel.

January 15, 1915.

In re ISSUANCE OF FINAL ELECTRICAL INSPECTION CERTIFICATE.
HON. RAY PALMER, Commissioner of Gas and Electricity.

Dear Sir:

We acknowledge receipt of your communication of December 17, 1914, to this department. It concerns the issuance of the final certificate after the installation of electrical wires.

The certificate has been refused because the outlet boxes are not supported independently of the conduit systems. The outlet box receives the electrical wires just before passing into the electric light fixture, and upon ceiling work it is covered by the lath and plaster and, therefore, is not visible. The object is to have the outlet box securely fastened. If not, the weight of the electric fixture draws the outlet box down, which frequently strips the insulated wire, and a likelihood of fire thereby ensues, caused by short circuit or a ground circuit. The method of fastening the outlet boxes to the metal tubing has been found unsatisfactory.

Section 834 of The Chicago Code of 1911 is in part as follows:

“The said city electrician is hereby empowered to inspect or reinspect all * * * wires and apparatus connecting the electric current, * * * and when found to be unsafe to life or property, he shall notify the person or corporation owning * * * to place the same in a safe and secure condition within 48 hours.”

Paragraph 49 A, Section 862, of The Chicago Code of 1911, is in part as follows:

“Switch and outlet boxes must be arranged to secure in position the conduit or flexible tubing protecting the wire; and must be firmly secured in position by means of some standard device which may or may not be a part of the box.”

* * * * *

“Switch and outlet boxes must be so arranged that they can be securely fastened in place independently of the support afforded by the conduit piping, except that when entirely exposed, standard boxes, which are threaded so as to be firmly supported by screwing onto the conduit pipe, may be used.”

The standard device now used is an iron brace fastened between the joists and upon which the outlet boxes are bolted. The contention in the matter at issue was that the Wadeford Electric Company performed the work before May 18, 1914, at which time a new set of rules of your department went into effect; and it is contended that the former rules did not require outlet boxes to be installed as above described, except by implication.

Your communication informed us that it has long been the practice to fasten the outlet boxes independently of the tubing, and that in this particular work it was so done in some cases by this company.

In view of the ordinance as above quoted, we can see no reason why the work should not be done according to your ideas. Firstly, the said paragraph 49 A of Section 862 specifically requires independent fastening of outlet boxes, irrespective of the tubing; and, secondly, under the authority given in Section 834, even after your department has made final inspection and issued final certificate, you can reinspect, and if upon reinspection you determine that said current is unsafe to life and property, you have the authority to require that said current be transmitted by apparatus and wires safely installed. This authority can be exercised irrespective of the above referred to paragraph 49, or without regard to your rules concerning the installation of electrical wires.

Accordingly, you are justified in withholding the final certificate in this case until a compliance is finally had with the ordinance as above stated.

We are returning herewith the correspondence between your department and Atwood, Pease & Loucks, attorneys for the Wadeford Company.

Yours truly,

M. W. CAGNEY,
Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,
Corporation Counsel.

January 20, 1915.

In re LIABILITY OF TELEPHONE COMPANY FOR FAILURE TO INSERT OR ERRONEOUSLY INSERTING SUBSCRIBERS' NAMES IN DIRECTORY.

HON. MONTAGUE FERRY, Commissioner of Public Service.

Dear Sir:

Your request for advice as to the liability of the Chicago Telephone Company to its subscribers for failure to insert or erroneously inserting their names or telephone numbers in the telephone directory has been referred to me for reply.

I am of the opinion that the telephone company is liable for such damages as its subscribers may sustain by reason of such errors in the publication of this directory. The collection of such damages from the company, however, is beyond the scope of the powers of your department, and the subscribers having such claims must themselves, through their own counsel, secure redress from the telephone company.

Very truly yours,

LORING R. HOOVER,
Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,
Corporation Counsel.

January 27, 1915.

In re PUBLICATION OF APPROPRIATION ORDINANCE.

HON. FRANCIS D. CONNERY, City Clerk.

Dear Sir:

In response to your oral inquiry as to the particular form in which you should publish the appropriation ordinance for the year 1915 so as to conform with the provisions of the law governing such publication, we submit the following:

Section 3 of Article V of the Cities and Villages Act provides that all ordinances making any appropriation shall within one month after they are passed be published at least once in a newspaper published in the city, and no such ordinance shall take effect until 10 days after it is so published.

It is your duty, therefore, to publish the appropriation ordinance for the year 1915 on or before February 14, 1915, the meeting at which the ordinance was passed having been called for January 16, 1915. It is, however, highly desirable to have the same published not later than Friday, January 29, 1915, in order that the tax levy ordinance may be passed at the meeting of February 8, 1915.

Chapter XLIX of The Chicago Code of 1911 provides for the letting of a contract annually for the publication in an English newspaper, being published at least six times a week, of those matters required by law or any ordinance of the city to be published in a newspaper, and the newspaper to which

such contract may be awarded shall be the official journal of the city.

You should, therefore, publish in the newspaper to which the contract has been let and which is now the official newspaper of the City of Chicago for the purpose of making legal publications.

At the meeting of January 16-18, 1915, the City Council passed an ordinance entitled "An ordinance making appropriations for corporate, school, public library and tuberculosis sanitarium purposes for the fiscal year from January 1, 1915, to December 31, 1915, which ordinance is published at pages 2882 to 3079, inclusive, of the Journal of the Proceedings of the City Council of January 16-18, 1915.

January 25, 1915, the Mayor vetoed certain items of said appropriation ordinance, which veto, together with the changes made by the Mayor and appearing in a separate ordinance which the Mayor has signed, should be published along with the said appropriation ordinance. The amendatory ordinance was passed at the meeting held January 25, 1915.

In our opinion, in order to constitute a legal publication, you should publish in the official newspaper of Chicago, within the time above set out, the following:

First. Said ordinance passed by the City Council on January 16-18, 1915, and printed at pages 2882 to 3079, inclusive, of the Journal of the Proceedings of the City Council of those dates.

Second. The Mayor's veto message of January 25, 1915, which was submitted to the City Council and which you now have in your possession. This veto message should be accompanied by the record of the City Council thereon:

Third. The amendatory ordinance submitted by the Mayor on January 25, 1915, amending the said appropriation ordinance passed January 16-18, 1915.

In our opinion, said appropriation ordinance, said veto message and said amendatory ordinance constitute the annual appropriation ordinance for the year 1915.

We respectfully suggest that the following would be a proper certificate by you in making such publication:

"STATE OF ILLINOIS, }
COUNTY OF COOK. } ss.

I, Francis D. Connery, City Clerk of the City of Chicago, do hereby certify that the foregoing is a true and correct copy of the certain ordinance passed by the City Council of said City of Chicago at a meeting of said City Council held on the sixteenth and eighteenth (16-18) days of January, A. D. 1915, entitled 'An ordinance making appropriations for corporate, school, public library and tuberculosis sanitarium purposes for the fiscal year from January 1, 1915, to December 31, 1915'; and

I do further certify that the following is a true and correct copy of the certain veto message submitted by Honorable Carter H. Harrison, Mayor of said City of Chicago, to said City Council of said city at its regular meeting held on the twenty-fifth (25) day of January, A. D. 1915, vetoing certain items of said appropriation ordinance passed at the said meeting held on January 16 and 18, 1915, viz.:

(Veto message.)

And I do further certify that the following is a true and correct copy of that portion of the Journal of the Proceedings of said City Council showing the action taken by said City Council on said twenty-fifth (25) day of January, A. D. 1915, with reference to said veto message, viz.:

(Insert copy of Journal showing action of Council on veto message.)

FRANCIS D. CONNERY,

(Seal.)

City Clerk."

(Insert Amendatory Ordinance of January 25, 1915.)

"STATE OF ILLINOIS, }
COUNTY OF COOK. } ss.

I, Francis D. Connery, City Clerk of the City of Chicago, do hereby certify that the foregoing is a true and correct copy of the certain ordinance passed by the City Council of said City of Chicago on the twenty-fifth (25) day of January, A. D. 1915, entitled 'An ordinance amending an ordinance entitled "An ordinance making appropriations for corporate, school, public library and tuberculosis sanitarium purposes for the fiscal year from January 1, 1915, to December 31, 1915," passed by the City Council January 18, 1915,' which said ordinance

passed January twenty-fifth (25), 1915, was approved by the Mayor of said city on January twenty-seventh (27), 1915.

FRANCIS D. CONNERY,

(Seal.)

City Clerk."

Yours respectfully,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,

Corporation Counsel.

January 27, 1915.

In re EFFECT OF ELEVATED THROUGH ROUTE ORDINANCE ON
COMPENSATION TO BE PAID TO THE CITY ON COLLEC-
TIONS MADE AT STATIONS ON THE WEST SIDE OF
LOOP.

HON. MICHAEL ZIMMER, Comptroller.

Dear Sir:

In your letter of December 28, 1914, you inform us that complications have arisen in the matter of accounting between the city and the Northwestern Elevated Railroad Company with reference to the payment by said company, to the city, of 1 per cent. of the gross receipts of the company collected at stations of the company on the west side of the loop, under the ordinance of January 8, 1894, and ordinances amendatory thereto.

This whole question was treated in an elaborate opinion dated February 1, 1912, and addressed to John E. Traeger, City Comptroller. In this opinion we held that the city was entitled to 1 per cent. of the gross receipts collected at the stations of all primary lines (the primary lines were indicated on plat transmitted with said opinion and included the west side of the loop), and that the city was entitled to 1 per cent. of the gross receipts collected by the company at each station on the west side of the loop.

At the time this opinion was written and until the elevated through route ordinance of July 28, 1913, became effective, the trains of the Northwestern Elevated Railroad Company, operating on the west side of the loop, traveled in a

northerly direction, and over the remaining system of the Northwestern Elevated Railroad Company north of Lake street. Since the aforesaid through route ordinance became effective, the direction of travel on the west side of the loop has been reversed so that trains of the company operating on the west side of the loop travel in a southerly direction on the west side of the loop and over the system of the South Side Elevated Railroad Company. In other words, while fares paid formerly at stations on the west side of the loop were paid by passengers who traveled on the lines of the Northwestern Elevated Railroad Company north of Lake street, today the fares paid at these stations are paid by passengers who travel over the lines of the South Side Elevated Railroad Company.

The company takes the position that by reason of the reversal of the traffic of its trains on the west side of the loop it is no longer required to pay 1 per cent. of the gross receipts collected at the stations of the company on the west side of the loop, but desires to use the ratio that the traffic at these points bore to the total loop traffic prior to the time that the elevated through route ordinance went into effect.

The through route ordinance of July 28, 1913, does not change the obligations of the Northwestern Elevated Railroad Company with reference to the payment by said company of compensation to the city as provided in the ordinance of January 8, 1894, and subsequent ordinances. Under said through route ordinance and subsequent ordinances to the company, the obligation to pay compensation to the city remains unaffected and the company, under said ordinance of January 8, 1894, and the amendatory ordinance of June 24, 1895 (Special Ordinances of 1898, page 944), is obligated to pay to the city 1 per cent. of the gross receipts collected by said company at all stations on the west side of the loop in the same manner as it has paid to the city heretofore.

In our former opinion of February 1, 1912, we stated that we did not believe it advisable to include the receipts of the company from advertising sources in the gross receipts of the company, upon which the city is entitled to a per centum. You now ask if the same conditions prevail as

formerly, preventing the collection of this money, which represents a total revenue of \$84,000 per annum to the company, for advertising and station concessions.

The reason that we took the position that it was not advisable to include the receipts of the company from advertising sources was, that the city has always contended that the carrying of advertisements inside elevated cars, and on elevated platforms constructed over the public highways of the city, was unlawful unless authorized by the city. For this reason and for the further reason that it was proposed to pass a new ordinance requiring elevated companies to pay compensation on advertising receipts, we did not believe it proper for the city to include the receipts of the company from advertising sources in the gross receipts of the company.

Since our opinion was written, an ordinance has been passed making it unlawful for elevated cars to carry advertisements. The city has begun prosecutions against some of the elevated companies for violation of this ordinance and the companies have filed a bill praying that the city be enjoined from prosecuting the companies under the above ordinance. A restraining order has been entered against the city, and the hearing on the bill of the elevated companies is expected to come up shortly.

If the company is willing to pay the money on condition that the payment of such money by the company and the receipt thereof by the city shall not affect or prejudice the rights of either the city or the company in any present or future litigation, with respect to the right of the company to permit advertising in its cars or on its platforms, and except upon the further condition that the city shall in no event be called upon to return the money or any part thereof so received by the city as its share of the receipts of the company from advertising sources, we are of the opinion that the city may safely receive such sums without danger that the pay-

ment of said sums to the city may compromise the city in any way.

Yours very truly,

MAX M. KORSHAK,
Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,
Corporation Counsel.

January 29, 1915.

In re VALIDITY OF ORDINANCE REQUIRING PERMITS FOR PARADES.

HON. JAMES GLEASON, General Superintendent of Police.

Dear Sir:

We have your communication of January 28, 1915, in which you inform this department that Judge Gemmill, sitting in The Municipal Court of Chicago, discharged twenty-one defendants arrested on Sunday, January 17th, for attempting to hold a parade on the streets of Chicago without a permit in violation of Section 2433 of The Chicago Code of 1911.

We are informed that Judge Gemmill held that ordinance invalid and unconstitutional upon the authority of the case of *City of Chicago v. Trotter*, 136 Ill. 430.

In your communication you state that another parade of the unemployed is contemplated on Sunday next, and you wish to be advised as to your power in regard thereto, in view of the decision of the Municipal Court referred to.

The ordinance which was declared unconstitutional by the Supreme Court of this state was passed by the City Council of the City of Chicago on July 23, 1886, and is as follows:

"That no parades or processions shall be allowed upon the streets of the city, nor shall any open air meeting be held upon any ground abutting upon any street or avenue of the city, until a permit therefor shall first be obtained from the police department, under a penalty of not less than \$25 nor more than \$100. Such permits shall be issued without fee by the superintendent of police, and shall, in the case of parades and processions, specify the route to be followed upon the streets of the city."

The reason for which the foregoing ordinance was held to be invalid was, that by the terms thereof the superintendent of police was lodged with absolute discretion as to who shall be permitted to gather together in processions and who shall not.

The court held that:

“Parades and processions upon the streets of a city are not necessarily so productive of danger and disorder as to render them *per se* the creators of public disturbances, nor are they necessarily nuisances.”

The court held further that under the terms of the ordinance the superintendent of police had the power “to dictate that the members of one political party, or of one religious denomination, or of one civic society, may, and the members of another political party, religious denomination or civic society may not, have such parades or processions, and to arbitrarily fix the times, occasions and localities when and where such assemblages will be allowed,” and that under the ordinance the superintendent of police had even authority to prohibit all street parades and processions whatsoever.

In view of the construction of the ordinance referred to by the Supreme Court, it held the same to be unreasonable and void. The Supreme Court, however, recognized that under proper conditions, general in their nature, parades for unlawful purposes, such as might create public disturbances or nuisances, or such as would substantially interfere with the use of the streets by the public could be prohibited.

Since the decision of the Supreme Court in the Trotter case the City Council amended the ordinance passed upon by that court, and made it mandatory upon the superintendent of police to issue a permit for parades in all cases upon the public streets if, upon investigation, the general superintendent of police should find that the same “is not to be held for any unlawful purpose, and will not in any manner tend to a breach of the peace, or unnecessarily interfere with the use of the public streets and ways of the city or the peace and quiet of the inhabitants thereof.” This language first appears in the Chicago Code of 1905 as Section 2128. The same language was incorporated in Section 2433 of the Chicago Code.

of 1911, under which, we are informed, the prosecutions before Judge Gemmill were instituted.

In our opinion, the amendment in the ordinance originally passed in 1886, which the Supreme Court of this state criticised, was drafted and designed to meet the very criticisms thereon made in the Trotter case, and we are firmly convinced that Section 2433 of The Chicago Code of 1911 is a constitutional and valid ordinance, the decision of Judge Gemmill to the contrary notwithstanding.

We do not wish to be understood as intimating that the procession conducted on January 17th was for any unlawful purpose or that the procession contemplated on next Sunday will be for an unlawful purpose. We are of the opinion, however, that the parade contemplated on next Sunday cannot lawfully be conducted until a permit has been issued therefor by the department of police. It may be that if a proper application is made therefor it will be mandatory upon the general superintendent of police to issue the permit if he shall find the conditions of the ordinances of the City of Chicago are complied with, but those are questions for the general superintendent of police to determine.

Respectfully submitted,

JOSEPH F. GROSSMAN,
Assistant Corporation Counsel.

BRYAN Y. CRAIG,
First Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,
Corporation Counsel.

January 29, 1915.

In re PROPOSED ORDINANCE LICENSING COLD STORAGE WAREHOUSES.

HON. GEORGE B. YOUNG, Commissioner of Health.

Dear Sir:

You referred to this department, with a request for an opinion regarding its validity, the draft of an ordinance licensing and regulating cold storage warehouses.

You state, if we should hold that the ordinance as now

drawn is illegal, you would like to have a new draft made which would comply with the statutory requirements, but you state in that connection that you would like to have the ordinance retain the license or permit requirement, since you consider that the most satisfactory way of exercising sanitary control over a business of this nature.

The question of the right of the city to require cold storage warehousemen to be licensed has often been considered by members of the law department of this city. It is a matter that is involved in a great deal of doubt. When the question of regulating these warehouses was up, from time to time, the license proposition was always taken into consideration. It was strenuously insisted by attorneys representing these warehousemen that because there is no express power to license such warehouses given to the city, the authority does not exist.

We have never conceded this point, but heretofore the efforts of the City Council have been directed towards regulating the business without including a license provision in the regulatory ordinance. In an opinion written on October 14, 1912, we stated that under the power to regulate the sale of provisions (Clause 50), to regulate the inspection of same (Clause 53), to make regulations necessary or expedient for the promotion of health (Clause 78), and other grants, the municipality has sufficient authority over the subject matter to enact an ordinance of the kind then under consideration, which after being amended, was subsequently passed. Under ordinary circumstances, we would say that having the power to regulate as provided for in that ordinance, it would have the power to license, since licensing has always been regarded as a means of regulation, and since you say that it is in the present instance "the most satisfactory way of exercising sanitary control" over same.

There is, however, to be considered a statute relating to warehouses which undertakes to regulate all warehouses. This statute provides a license for what are designated "Class A" warehouses (these being public warehouses for the storage of grain), but does not provide for licensing warehouses of "Classes B or C." Cold storage warehouses are warehouses of "Class C."

The statute to which we refer and other statutes relating to warehouses and warehouse receipts, are regulatory in their nature, but they are concerned principally with the safety of the goods stored. We find nothing in any of these statutes which is especially directed towards the regulation of such a warehouse with reference to its effect on the public health. Such being the case, it does not appear that it would be contrary to the statutes to provide for licensing as a means of preservation of the public health. Statutes and ordinances regulating same for this purpose have been upheld as a proper exercise of the police power.

Freund on Police Powers, Section 297.

North American Cold Storage Co. v. City of Chicago,
211 U. S. 306.

Inasmuch as the power to regulate unquestionably exists, we see no reason why a license provision designed for the purpose of regulating the business which is not contrary to any provision of the statutes should not be sustained by our courts.

We assume from your letter and from information which has come from other sources that the present regulatory ordinance has not been found entirely practicable, and we assume further from your letter and from the general tone of the ordinance which you have submitted and the amount of the license fee specified therein, that the licensing would be simply and solely for purposes of regulation and would not be intended as a means of raising revenue.

In view of all the circumstances, it may be desirable to pass such an ordinance as you have submitted, and, if the same is attacked as invalid, to await the decision of the Supreme Court.

We found some objection as to the form of the draft submitted, and we have, therefore, redrafted two of the pages—otherwise we have made no change. We return the said ordinance, as altered by us, herewith.

Yours truly,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,
Corporation Counsel.

February 2, 1915.

In re TELEPHONE INTER COMMUNICATION SERVICE.

HON. MONTAGUE FERRY, Commissioner of Public Service.

Dear Sir:

Your recent communication concerning the complaint of the Star Gum Company, praying for physical connection of their privately owned automatic telephone system with the Chicago Telephone Company, is at hand.

Your first inquiry is whether or not it is "within the powers of the telephone bureau to issue an order on the Chicago Telephone Company that such connection be made?" An answer to this question involves a consideration of the powers of the telephone bureau and the Department of Public Works.

Section 5 of an ordinance establishing the Department of Public Service, passed March 15, 1914, provides as follows:

"Section 5. Powers.) Said department shall enforce all ordinances, orders and resolutions in respect to public utilities now or hereafter in force in the city, and shall enforce all laws in respect to public utilities now or hereafter in force under and by which power and authority are conferred upon the city."

Section 6 of the same ordinance provides in part as follows:

"Section 6. Duties.) The department shall require all public utilities under its jurisdiction, supervision or control, which supply or furnish any service, product or commodity to the city or to the inhabitants thereof, to comply with the terms and provisions of their grants.
* * * The department shall, whenever the City Council by its order so directs, formulate and set forth in writing any matter of complaint against any public utility which shall supply or furnish any service, product or commodity to the city or to the inhabitants thereof, and shall take such further action on said matter of complaint as the City Council may direct."

Paragraph 4 of Section 1 of the same ordinance as last amended December 14, 1914, provides as follows:

"Paragraph 4. *There is hereby established a bureau in the Department of Public Service which shall be known as the Telephone Bureau. Said bureau shall have charge of all matters arising in said department relating*

to telephones. There is hereby created the office of Telephone Supervisor, who shall be the head of said bureau."

Section 5 of the Chicago telephone ordinance, passed November 6, 1907, in part provides as follows:

"5. Company to adopt improvements and make extensions. The Chicago Telephone Company shall, without extra charge therefor to its lessees, subscribers and patrons or the City of Chicago, at all times maintain its plant, system, wires, cables, electrical conductors and other equipment and service at the highest practicable efficiency, and to that end shall promptly adopt and put into use within the City of Chicago all available improved apparatus, appliances, equipment *and methods of service*, developed in the progress of the art of telephony, which shall have come into common use from time to time, *or if experience has shown them to be practicable, and shall furnish the same to its said lessees, subscribers and patrons within said City of Chicago.* Said Chicago Telephone Company shall at all times during the period of this grant *so operate its plant, system, wires, cables, electrical conductors and other equipment as to give to its said lessees, subscribers and patrons the best service possible under then existing conditions of the art of telephony.*

It shall be the *duty of the Commissioner of Public Works* to enforce the provisions of this section and any ordinances or resolutions passed pursuant hereto, and he shall report any violations hereof to the City Council.
* * *

The second paragraph of Section 4 of an ordinance amending the telephone ordinance of November 6, 1907, passed March 11, 1912, provides as follows:

"It is expressly understood and agreed that the City Council of the City of Chicago may at any time and from time to time, by general ordinance or by special ordinance amendatory of said ordinance of November 6, 1907, or otherwise, designate or appoint any person, official, bureau, commission, or other body to perform any or all of the duties or exercise any or all of the powers which said ordinance of November 6, 1907, or this ordinance, provide shall be performed or exercised by the Comptroller, Deputy Comptroller, Commissioner of Public Works, Chairman of the Finance Committee of the City Council, the Corporation Counsel or the City Elec-

trician, and that in the event of such designation or appointment by the City Council, the person, official, bureau, commission or other body so designated or appointed shall succeed to and perform such of the duties and exercise such of the powers now imposed or conferred by said ordinance of November 6, 1907, or this ordinance, upon said above mentioned officials or employes of the City of Chicago, or any of them, as may be provided for by said City Council."

Under the ordinance, as amended from time to time, creating your department, portions of which are hereinbefore set out, power to enforce *ordinances, orders, resolutions* and *laws* is conferred upon your department, and this power, in our opinion, must be construed to mean that your department can enforce said ordinance, etc., by such action and proceedings and to the extent specifically designated therein.

We have hereinbefore set out all such ordinances as in our opinion relate to the subject matter of the complaint of the Star Gum Company and find therein no provisions authorizing your department to do anything more than to request the Chicago Telephone Company to comply with the ordinances, etc., and in the event said request is not complied with, to notify the City Council of said company's failure to comply with said ordinances, etc., as requested. No order which your department may make concerning this subject will create any greater obligation on the said telephone company than exists under the provisions of the ordinances, etc., of the City Council.

If, therefore, under the existing ordinances, etc., of said company, it is not required to furnish the service sought by the Star Gum Company, your department is without power to issue any order obligating said company to install such service, and any such obligation could only be created by appropriate legislative action. If the telephone company is, under its ordinance, obliged to furnish such service, no order of your department will add to the obligation, but any binding action to be taken to enforce the same must emanate from the City Council. It would seem that appropriate legal proceedings authorized by the City Council will be necessary

to compel the company to comply with its ordinances, if it refuses to do so.

We do not consider it necessary in this opinion to decide whether or not the ordinance creating your bureau delegates to you the performance of the duty of the Commissioner of Public Works, as set forth in that portion of Section 5 of the 1907 ordinance hereinabove quoted, as it is provided may be done by the second paragraph of Section 4 of the amendatory ordinance of 1913; inasmuch as the ordinance creating your department confers upon you as full power as is conferred by said portion of Section 5 on the Commissioner of Public Works, which powers could have been conferred independent of said second paragraph of said Section 4.

Your second question as to what action should be taken by you to advance this case towards a final settlement if it is not within your power to issue an order on the Chicago Telephone Company, may now properly be considered. Your letter does not fully set out the facts concerning the complaint of the Star Gum Company, and we shall, therefore, state the facts as we understand them from a recent interview held with you:

The Star Gum Company has installed in its plant an automatic system of private telephones which it desires to have connected with the manual system of the Chicago Telephone Company, being ready to pay for such service the rates prescribed by ordinance which apply to manual systems which are installed by the telephone company, and we understand that your department considers such a connection as is sought by the Star Gum Company to be practicable and in fact an improvement of service, but that the telephone company should be permitted to, itself, install and maintain the automatic system desired for use by its subscribers. In other words, you consider that the telephone company should furnish, at the rates provided by the third paragraph of clause (m) of Section 2 of the 1913 ordinance, an automatic system to such of its subscribers as desire the same, but that in the event said company refuses itself to install such system and the subscriber installs the same, then the company should

be compelled to connect its lines with the system of the subscriber.

If such an automatic system affords an improved method of service which is practicable, then said company under the first paragraph of Section 5 of the 1907 ordinance is obliged to furnish such equipment and the method to be pursued by you to secure the same is to report the matter to the City Council with your recommendations so that it may enact appropriate legislation requiring the installation of such service.

As to compelling the Chicago Telephone Company to connect its system with a privately owned automatic system, we are of the opinion that the power of the City Council so to do, under the contract ordinances of said company, depends upon the character of such privately owned automatic system, and whether or not the particular system in each case is in fact an improved method of service and practicable.

The ordinances of the City of Chicago accepted by the Chicago Telephone Company are of a contractual nature and it is under the terms of these ordinances, as will be noted, that we have based our opinion. The question whether the Chicago Telephone Company can be compelled to furnish to its subscribers local automatic service, or to connect its lines with privately owned automatic exchanges irrespective of the terms and conditions of its contract ordinances, arises only in the event that this particular method of service and apparatus is not an improvement or is not practicable, and inasmuch as your department considers the same to be both an improvement and practicable, it will be unnecessary for us to treat this phase of the question in this opinion, wherefore we do not do so.

Very truly yours,

LORING R. HOOVER,
Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,
Corporation Counsel.

FEBRUARY 3, 1915.

In re RIGHT TO USE TRACTION FUND FOR THE ESTABLISHMENT
OF PASSENGER OMNIBUS LINES, AND OWNERSHIP AND
OPERATION BY CITY OF SUCH LINES.

HON. EUGENE BLOCK,

Chairman Committee on Local Transportation.

Dear Sir:

We are in receipt of your communication of January 14, 1915, requesting this department to render an opinion as to whether the traction fund may be used for the establishment of passenger omnibus lines for operation within the city, and whether the city has the power to own such omnibus lines, and whether the city has power to maintain and operate such lines. Replying thereto, we beg to say:

The ordinances of February 11, 1907, to the Chicago Railways Company and The Chicago City Railway Company provide that after the deduction from the gross receipts of certain items therein specified, the amount remaining shall be considered as net receipts and shall be divided between the companies and the city in the following proportions: 45 per cent to be retained by the companies, and 55 per cent to be paid to the city. Similar provisions are contained in the ordinance of March 30, 1908, to the Calumet & South Chicago Railway Company and the ordinance of March 15, 1909, to The Chicago Southern Street Railway Company.

Each of the four ordinances just referred to contains the following provision:

"It is further provided that, *subject to the action of the City Council of said City*, the said City shall deposit the amount so paid to the said City to the credit of a separate fund to be kept and used for the purchase and construction of street railways by said City; but any failure to comply with this provision shall in no way affect the rights or obligations of the Company under this ordinance." (See Section 25 of ordinance of Chicago Railways Company, Section 24 of ordinance of The Chicago City Railway Company, Section 22 of ordinance of Calumet & South Chicago Railway Company and Section 20 of the ordinance of The Chicago Southern Street Railway Company.)

The fund provided for in said sections will be hereafter referred to as the "traction fund."

The said sections provide that subject to the action of the City Council the traction fund is "to be kept and used for the purchase and construction of *street railways* by said City."

Booth on Street Railways, at page 2, defines street railways as follows:

"§1. STREET RAILWAY DEFINED.—Street railways are those which are constructed in streets, whether on, below, or above the surface, along and over which cars are propelled by electrical or other power *on fixed tracks* as common carriers of passengers for the convenience and accommodation of the people living upon or near such highways, and to facilitate their transportation from one point to another in a municipality or to and from its suburbs."

See, also:

Allerton v. City of Chicago, 6 Fed. 555.

Frankfort, etc., Co. v. Philadelphia, 58 Pa. St. 119.

Union Traction Co. v. City of Chicago, 199 Ill. 484.

While passenger omnibus lines have some features in common with street railways, they do not run on rails or fixed tracks, which is one of the outstanding distinguishing characteristics of a street railway. In our opinion passenger omnibus lines cannot be considered street railways.

The question then arises whether the traction fund can be used for the purchase and establishment by the city of passenger omnibus lines, notwithstanding such lines are not street railways.

In the case of *Barsaloux v. City of Chicago*, 245 Ill. 598, the Supreme Court of this state had the aforesaid provision of the said ordinances of February 11, 1907, under consideration. In this case, Barsaloux, a citizen and taxpayer, prayed for an injunction against the payment by the city of certain warrants, payable out of the money appropriated by an appropriation ordinance, the validity of which was attacked. The item in the appropriation ordinance complained of was for conducting an investigation into and securing a report of expert engineers and others as to the desirability of constructing subways under the provisions of said above mentioned ordi-

nances of February 11, 1907. It was contended that the traction fund could not be used for that purpose for the reason that subways were not street railways and that the traction fund could be used for the purchase and construction of street railways *only*.

The case was originally heard by Judge George A. Carpenter, then sitting as one of the judges of the Circuit Court of Cook County and now sitting as one of the judges of the United States District Court. An appeal from Judge Carpenter's decision was taken to the Supreme Court and his decision was affirmed by that court.

The Supreme Court, in discussing the question whether the city could use the traction fund for acquiring or constructing subways, said, at page 611:

"Section 24 of the traction ordinance provides that the city shall deposit fifty-five per cent of the net earnings of the traction companies to the credit of a separate fund, to be kept and used for the purchase and construction of street railways by said city. *Under this ordinance* clearly the city would have no power to divert this fund to general corporate purposes, but using it to construct subways is not a diversion of such fund."

While it may be considered as settled by the decision in the Barsaloux case that under the 1907 ordinances as originally passed and as they now stand the traction fund cannot, without further action by the City Council, be used for any purpose except the purchase and construction of street railways, the question remains as to whether the provision of the ordinances, in respect to the use of the fund, restricts the city for all time to the use specified in the ordinances, or whether the language used amounts only to a declaration by the city of its purpose and intent, at the time the passage of the ordinances, in respect to the use of the fund, leaving the city free at any time thereafter, by appropriate action, to abandon and change its original purpose and intent in respect to said fund, as expressed in the declaration in the ordinances, and to apply and use the fund for another purpose, such as the establishment of passenger omnibus lines.

If the traction fund when paid over to the city by the companies belongs to the city and the city is under no con-

tract obligation to any other person in respect thereto, it would seem that the city should have the right to make such disposition of its own property as it might see fit, and that its own declaration made in the 1907 ordinances in respect to the purpose for which the fund should be used would in no-wise interfere with the city making a subsequent declaration in regard to the use to which the fund should be put which would be different from the use which was originally contemplated. There is nothing in the ordinances which gives the grantee companies any interest in or control over the traction fund after it has been paid over to the city. On the contrary, the ordinances all expressly provide that any failure on the part of the city to deposit the 55 per cent so paid to the city to the credit of a separate fund to be kept and used for the purchase and construction of street railways by the city "shall in no way affect the rights or obligations of the company under this ordinance."

It is to be observed that the section of the ordinances, in respect to the use of the fund by the city, provides that:

"* * * subject to the action of the City Council of said City, the said City shall deposit the amount so paid to the said City to the credit of a separate fund to be kept and used for the purchase and construction of street railways by said City; * * *"

These words indicate clearly that it was the intention of the City Council (in the paragraph of the ordinances in respect to what should be done with the traction fund), merely to declare the views entertained by it at that time in regard to what was the most desirable use for the fund, but that such declaration was "subject to the action of the City Council" and that the City Council intended to and did reserve to itself the right at any time by action on its part to direct that the fund be used for another purpose if, in the judgment of the City Council, future developments should make it inexpedient, unwise and impossible to use the fund for the purchase and construction of street railways by the city.

The traction ordinances reserve to the city the right to purchase the street railways of the grantee companies at the

expiration of the grants, and also the right to designate a licensee who shall have the right to purchase said street railways at the expiration of the grants. There is, however, no obligation on the part of the city to purchase the properties, or any of them, at the expiration of the grants. If the traction fund should be permitted to accumulate until the expiration of the present grants, it has been estimated it would amount to more than \$50,000,000. If the city should, at the expiration of the present grants, make new grants to the present companies, or to a new company or companies, the city might find itself in a situation where there was no occasion or field for the purchase or operation of street railways, and have in its possession a fund amounting to many millions of dollars which it could use for no other purpose than the purchase and operation of street railways. Many other conditions might arise during the period of the grants contained in the present ordinances which would make it inexpedient, unwise and perhaps impossible for the city to purchase or operate street railways.

It cannot reasonably be supposed that the City Council, under the conditions which obtained at the time of the passage of the ordinances, would undertake to restrict the city forever to using the traction fund solely for the purchase and operation of street railways, when no occasion or opportunity might ever arise for such use. Such a construction of the ordinances would not be warranted unless the language used is so plain and explicit as to admit of no other meaning.

We are of the opinion that the language used in the traction ordinances in regard to the use of the traction fund was merely declaratory of the views of the City Council *at the time of the passage of the ordinances* as to the uses to which the traction fund should be put, but that such declaration was subject to any future action of the City Council, and that the City Council reserved the right by appropriate action *at any future time* to apply and use the traction fund for such a purpose as is the subject of your inquiry, namely, the establishment of passenger omnibus lines for operation within the city, provided the city has the power to acquire and operate such lines.

Nor would the present right of the City Council to use the traction fund for the purpose last mentioned be different, even if it were assumed that the City Council in providing the traction fund intended that such fund should be used for the purchase and construction of street railways and for no other purpose. The power to pass ordinances or regulations affecting the municipality carries with it, by implication, the power to modify, change or repeal unless contracts between the municipality and others are impaired thereby. A municipal corporation cannot abridge its own legislative powers and pass irrevocable ordinances unless contract rights are involved.

In *State ex rel. McClennan v. Graves, et al.*, 19 Md. 351, the court said, at page 373:

“The mayor and the city council are but trustees of the public: the tenure of their office impressed their ordinances with liability to change. They could not if they would pass an irrevocable ordinance. The corporation cannot abridge its own legislative powers.” (Citing *Goszler v. Georgetown*, 6 Wheaton 297.)

See, also, to the same effect, the following cases:

Welch, et al. v. Bowen, 103 Ind. 252.

Robinson v. Baltimore City, 93 Md. 208.

City of Santa Barbara v. Davis, 92 Pac. Rep. 308.

Bishoff v. State, ex rel., 43 Fla. 67.

In *First National Bank v. Keith*, 84 Ill. App. 103, the court said, at page 106:

“In all administrative matters it is not within the power of one city council to bind a succeeding council.”

Had the City Council in the ordinances, providing for the traction fund, stipulated with the companies that it would at some future time purchase the street railway lines of the companies with the moneys of the traction fund, then there might be some reason for the contention that the diversion of the fund for some purpose other than the purchase of street railways would impair the contract of the companies. This, however, is not the situation here. As heretofore pointed out, the companies have no interest whatsoever in this fund.

Holding, as we do, that no contract rights would be im-

paired if the city should use the traction fund for the establishment of passenger omnibus lines, we are of the opinion that even if it were the intention of the City Council in establishing the traction fund that such fund should be used for the purchase and construction of street railways *only* and for no other purpose, the City Council in making such provision had no power to bind succeeding councils, and that the City Council now has the right, by appropriate ordinance, to use the traction fund for the establishment of passenger omnibus lines within the city, provided the city has the power to acquire and operate such lines.

This view is in accord with the views expressed by Judge Carpenter in the Barsaloux case. In his decision (contained in Vol. 107, Briefs of the Corporation Counsel in the Supreme Court), Judge Carpenter said:

“Counsel for complainant has cited a number of cases to the effect that this fund is a trust fund, and during the life of the contracts with the railroad companies cannot be diverted to any other use.

“These, however, are all cases where the trust was imposed by the organic law. No case has been cited and no case can be cited to the effect that the city council, having once created this fund, has not the power to change its mind as to its use.

* * * * *

“Briefly, the body which created this trust, had equal authority to provide for some other use of the fund.

* * * * *

“The trust fund was created by the City. The railroad companies cannot complain of the diversion of this fund to other uses. The rights of third parties not intervening, the City, which created the fund, had the right to determine upon a change of its use.”

In reaching this conclusion, we have not overlooked the fact that the 1907 ordinances contain the provision that the ordinances should not become effective unless submitted to electors of the city and approved by a majority of the votes cast upon the question of the approval of said ordinances.

There was no obligation in the first place on the part of the city to refer the ordinances to the electors for their approval. The City Council had the power to pass the ordi-

nances without a referendum and the approval of the 1907 ordinances, as submitted to the electors by referendum, cannot now prevent the city from making provisions different from those in the 1907 ordinances, where no contract rights are affected.

On this point, Judge Carpenter, in his decision of the Barsaloux case, said:

"In this case, however, legally speaking, the referendum was wholly unnecessary and has no specific value. It was merely a determination on the part of the city council to take the measure of public opinion; it was a question of public policy, and not a condition precedent, or the establishment of a trust, except as the city council made it so. The council could impose any lawful condition before the ordinance became law. This condition of reference to the public was imposed by paramount authority. Had the voters rejected the ordinance, the council, legally speaking, could have passed it in spite of the adverse vote.

* * * * *

"The referendum has no legal significance in this case and in no wise affects the rights of the parties to the contract created by the ordinances, or the rights of the public."

Having reached the conclusion that the City Council now has the right to use the traction fund for the establishment of passenger omnibus lines, provided the city has the power to acquire and operate such lines, we now proceed to consider your questions in regard to whether the city has the power to own and operate passenger omnibus lines within the city.

On June 26, 1913, an act of the General Assembly was approved, entitled "An Act to authorize cities to acquire, construct, own and to lease or operate public utilities and to provide the means therefor."

Section 1 of said act is as follows: "

"SECTION 1. *Be it enacted by the People of the State of Illinois, represented in the General Assembly:* That any city in this State shall have the power, subject to the provisions of this act, to *acquire, construct, own and operate any public utility* the product or service of which, or a major portion thereof, is or is to be supplied to the City or its inhabitants, and to contract for,

purchase, and sell to private persons or corporations the products or service of such utilities; to lease any public utility owned by the city to any corporation organized under the laws of this State for the purpose of operating such public utility, for a period not longer than twenty years; to fix the rates and charges for the services rendered by such public utilities; and to make all needful rules and regulations in relation thereto."

Section 2 of said act defines the term "public utility" and is as follows:

"§2. The term 'public utility,' when used in this Act, means and includes any plant, equipment or property, and any franchise, license or permit, used or to be used for or in connection with the *transportation of persons or property* or the conveyance of telegraph or telephone messages; or for the production, storage, transmission, sale, delivery or furnishing of cold, heat, light, power, or for the conveyance of oil or gas by pipe line; or for the storage or warehousing of goods; or for the conduct of the business of a wharfinger."

It will be observed that under the definition of the term "public utility" such term means and includes, among other things, any plant, equipment or property, and any franchise, license or permit, used or to be used for or in connection with "*the transportation of persons or property.*" Passenger omnibus lines for operation within the city would clearly be "property used or to be used in connection with the transportation of persons." We are, therefore, of the opinion that the city has the power to acquire, own and operate passenger omnibus lines for operation within the city.

Section 3 of said act of the General Assembly provides that no city shall proceed to *acquire or construct* any public utility under the provisions of said act unless an ordinance of the City Council providing therefor has been duly passed and submitted to the electors of such city and approved by a majority of those voting thereon, and that such ordinance shall set forth the action proposed, shall describe the plant, equipment and property proposed to be acquired or constructed, etc.

Section 4 of said act provides that no city shall itself proceed to operate any such public utility for the use or benefit

of private users, for hire or charge for such use, unless the proposition to operate shall first have been submitted to the electors of the city as a separate proposition and approved by a majority of those voting thereon.

Section 5 of said act provides that no ordinance authorizing the lease of any public utility for a longer period than five years, nor any ordinance renewing any such lease, shall go into effect until sixty days from and after its passage, and that if, within said sixty days, there is filed with the city clerk of such city a petition signed by qualified electors of the city equal to five per cent of the votes cast at the last preceding election for mayor of such city, asking that such ordinance be submitted to popular vote, then such ordinance shall not go into effect unless the question of the adoption of such ordinance shall first be submitted to the electors of such city and approved by a majority of those voting thereon.

To recapitulate: We are of the opinion that the City of Chicago (a) has the power to acquire, construct, own and operate passenger omnibus lines for operation within the city; (b) that the City of Chicago may acquire and own passenger omnibus lines and lease the same to any corporation organized under the laws of the State of Illinois for the purpose of operating such passenger omnibus lines within the city, for a period not longer than twenty years; (c) that any ordinance for acquiring or constructing passenger omnibus lines by the city would have to be submitted to the electors of the city and approved by a majority of those voting thereon; (d) that before the city could proceed to operate passenger omnibus lines the proposition to operate would first have to be submitted to the electors of the city as a separate proposition and approved by a majority of those voting thereon; (e) that if the city acquired and owned passenger omnibus lines and desired to lease the same for a longer period than five years the ordinance authorizing such lease would not go into effect until the expiration of sixty days after its passage, and, if within sixty days there should be filed with the city clerk a petition signed by qualified electors of the city equal to five per cent of the votes cast at the last preceding election for mayor, asking that such ordinance be submitted to popular

vote, then such ordinance would not go into effect until the question of the adoption of such ordinance should first be submitted to the electors of the city and approved by a majority of those voting thereon; and, (f) that the city may (upon the passage of an appropriate ordinance), use the traction fund to acquire the omnibuses and property necessary or appropriate for the operation of passenger omnibus lines within the city.

Yours truly,

MAX M. KORSHAK,

Assistant Corporation Counsel.

BRYAN Y. CRAIG,

First Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,

Corporation Counsel.

FEBRUARY 5, 1915.

In re PROHIBITION OF FRAUDULENT ADVERTISEMENTS.

MR. HENRY S. BLUM,

Fort Dearborn Building,

Chicago, Illinois.

Dear Sir:

We have your communication of January 26, 1915, to which is attached a letter from one S. A. Barker of Springfield, Illinois, together with a copy of an ordinance passed by the City Council of the City of Springfield, relating to the subject of false and misleading advertising.

The ordinance passed by the City Council of the City of Chicago upon this subject-matter, is not quite so broad as that of the City of Springfield. The writer drafted the Chicago ordinance, and in so doing carefully avoided making the ordinance applicable to the publication and dissemination of false and misleading advertisements under all circumstances, within the corporate limits of the city.

The cities in this state have no express power to pass ordinances to prevent fraud and imposition. In the enumeration of the powers of the City Council there are, however, included the power to

“regulate and prevent the use of streets, sidewalks and public grounds for signs, * * * posting handbills, and advertisements (clause 17);
 to regulate and prohibit the exhibition or carrying of banners, placards, advertisements or handbills in the streets or public grounds or upon the sidewalks (clause 18);
 to regulate and prevent the flying of flags, banners or signs across the streets or from houses (clause 19);
 to regulate sales upon the streets, sidewalks and public places (clause 20);
 to pass and enforce all necessary police ordinances (clause 66).”

While an ordinance to prevent fraud and imposition may be classified as a police ordinance, the Supreme Court of this state has held that under clause 66, the city may pass only such police ordinances as relate to the subject-matter over which the City Council has been given express control.

City v. M. & M. Hotel Co., 248 Ill. 264.

Our ordinance was therefore limited in its scope so as to punish the making of a false and fraudulent statement in an advertisement circulated or posted upon the streets and public places of Chicago over which the city has control by express authority from the legislature.

We believe that such an ordinance may be sustained under the authority of *City of Chicago v. Kleuver*, 257 Ill. 317.

We doubt, however, the validity of the ordinance passed by the City Council of the City of Springfield, copy of which has been transmitted.

We herewith enclose copy of the ordinance in force in the City of Chicago.

Very truly yours,

JOSEPH F. GROSSMAN,
Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,
Corporation Counsel.

FEBRUARY 6, 1915.

In re USE OF SIDEWALKS, ALLEYS AND STREETS FOR LOADING
GOODS.

MESSRS. ALEXANDER H. REVELL & Co.,
 Adams St. and Wabash Ave., Chicago, Ill.
Attention of Mr. F. R. Judd.

Gentlemen:

Your communication addressed to Mr. Loring R. Hoover, Assistant Corporation Counsel, under date of February 2, 1915, in so far as it relates to the use of sidewalk in Adams street or the alley in the rear of your store, has been referred to me for reply.

In regard to the use of the sidewalk, we will say that there is no ordinance prohibiting the carrying of goods across the same to load your wagons. We are also informed by the General Superintendent of Police that there is no traffic regulation affecting such use of the sidewalk.

The law in regard to loading and unloading goods, etc., on sidewalks by abutting owners is set forth in *Tolman & Company v. City of Chicago*, 240 Ill. 268, and in numerous decisions there cited. The substance of the decision of the court is that the public has a paramount right to the use of the street in all its parts including, of course, the sidewalk, subject to such incidental and temporary or partial obstruction as manifest necessity may require. We are, therefore, of the opinion that as an abutting owner you have a right to a reasonable use of the sidewalk in Adams street for the purposes described in your letter.

The Chicago Code of 1911 was amended on March 24, 1913, (Council Proceedings, p. 4226) by the passage of an ordinance, adding the following section to the Code:

“‘2486½. RULES RELATING TO TRAFFIC IN PUBLIC ALLEYS) Within the territory of the City of Chicago bounded on the north by Kinzie street, on the south by 12th street, on the west by Canal street, and on the east by Michigan avenue, it shall be unlawful for any person, firm or corporation operating or driving any truck, dray, automobile or other vehicle to enter or travel along any public alley except in the manner herein specified: All trucks, drays, automobiles or other vehicles using any

public alley running due east and west shall enter such public alley from the east and shall travel in a westerly direction along such public alley and leave such public alley at a point west of the point of entrance. All trucks, drays, automobiles or other vehicles using any public alley running due north and south shall enter such public alley from the north and shall travel in a southerly direction along such public alley and leave such public alley at a point south of the point of entrance.'

"SECTION 2. This ordinance shall be in force and effect from and after its passage and due publication."

We think the section quoted above requires no interpretation and fully replies to your question in regard to the entering of alleys by vehicles.

There is no ordinance or specific traffic regulation governing the use of alleys outside of the loop, and the abutting owners are in our opinion entitled to such reasonable use and occupancy thereof as is not inconsistent with the rights of the public.

Respectfully,

VERNON L. BEAN,
Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,
Corporation Counsel.

FEBRUARY 11, 1915.

In re CITIZENSHIP OF MARRIED WOMEN.

MRS. THOMAS STEWART,
2927 Gresham Street, Chicago, Ill.

Dear Madam:

Your letter of February 10, 1915, inquiring concerning the status of your citizenship and that of your husband, was referred to the Corporation Counsel's office by His Honor, the Mayor, for answer, and in reply thereto we desire to say that owing to the fact that all the facts in your case are not clearly and fully set forth, it becomes necessary to assume certain facts.

We assume that prior to your marriage you were a citizen of the United States, either by Act of Congress, or by birth; we also assume that you married a foreigner; if such is

the case, your nationality follows that of your husband. See Section 3 of "An act in reference to the expatriation of citizens and their protection abroad" (Act of March 2, 1907), which is as follows:

"That any American woman who marries a foreigner shall take the nationality of her husband. At the termination of the marital relation she may resume her American citizenship, if abroad, by registering as an American citizen within one year with a consul of the United States, or by returning to reside in the United States, or if residing in the United States at the termination of the marital relation, by continuing to reside therein."

A woman married to a foreigner cannot apply for citizenship papers in her own individual person and name; but in such a case it is necessary for her husband, the foreigner, to make such application in her place and stead, whereupon after final papers of citizenship are granted to him, she, herself, automatically becomes an American citizen.

Enclosed please find application for first citizen's papers, which your husband should properly fill out, then present the same to Richard J. McGrath, Clerk Superior Court of Cook County, Room 437, County Building, Window 5; these first citizenship papers cost the sum of \$1.00.

A period of two years must elapse between the issuance of the first citizen's papers and the final citizen's papers; two years hence your husband can apply for his final papers and become a full-fledged American citizen; these second papers cost the sum of \$4.00.

We are informed by the naturalization clerk of the Superior Court of Cook County that under no circumstances are the fees above mentioned excused, nor is there any legal procedure by which papers can be obtained free of charge. It, therefore, follows that before you can register and vote, your husband must become a citizen of the United States.

Hoping this satisfactorily answers your question, we beg to remain,

Yours very truly,

J. J. VITERNA,
Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,
Corporation Counsel.

FEBRUARY 11, 1915.

In re SPECIFICATION OF QUANTITIES REQUIRED WHEN INVITING
PROPOSALS.

HON. RAY PALMER,

Commissioner of Gas and Electricity.

Dear Sir:

You submitted for examination a copy of specifications prepared in your department under which you received proposals for furnishing electrical supplies. You called particular attention to a paragraph in same which reads as follows:

“EXTENSION OF CONTRACT: The Commissioner of Gas and Electricity reserves the right to extend the contract which shall be entered into with the successful bidder for furnishing said electrical supplies, upon the completion thereof, for an amount equal to that stated in these specifications or for any portion thereof.”

You further state in your letter that you found last year that it is difficult to estimate with any degree of accuracy the amount of material required for use throughout the year, and that the amount specified for the different kinds of material was consumed early in the year; that upon investigation it was found that the market price was the same as at the time the bids were received, and with the sanction of the comptroller you extended the contract for the full amount of the materials specified therein; that this was done two or three times during the year, although neither the specifications nor contract contained any provisions for such extension.

Upon this state of facts, you make inquiry as to whether there is any legal objection to the insertion of the above paragraph in the specifications and contract.

We are unable to approve a paragraph which admits of

such a wide range of quantities as is proposed. The bidder is not informed by this paragraph as to quantities, except that they will be either as specified or double the amounts, or somewhere between the amounts specified and double these amounts. The rule with regard to inviting bids where the law requires competitive bidding is well stated in 28 Cyc., page 659, as follows:

“It is not only proper but necessary that bidders shall be duly informed by the officer soliciting bids as to the nature, quality, and quantity of the article to be purchased or the work to be done for the municipality to the end that they may bid intelligently, and binding contracts may result therefrom.”

We also call your attention to the following, taken from Dillon on Municipal Corporations, Section 807:

“When by charter or statute a municipality can only let its contracts to the lowest bidder after advertisement, an implied condition and restriction is placed upon the proceedings of the municipality that the various steps adopted by it to let a contract shall be of such a nature and taken in *such form as in good faith to invite competition.*”

It will readily be seen that if the quantities are not approximately stated, the competition may not be fair. A party who has had the contract before and thereby has learned what he may expect in regard to such quantities or who has inside information of any kind, may be prompted to alter his bid accordingly, to the disadvantage of another party who must bid without such information.

In the case of *Bigler v. New York*, 5 Abb. N. Cas. (N. Y.) 51, it was held that the specifications must be definite as to the quantity as well as the quality of materials required, or the contract will be void.

We do not believe the specifications prepared by you are sufficiently definite in this respect. It would be entirely proper to receive bids on the approximate amounts given and on certain percentages in addition if required. In fact, we believe it would be within the law to specify in the contract that such supplies should be furnished for a certain period, and the approximate quantities given, with the pro-

viso that additional quantities up to a certain percentage of same should be included if required within such period. This is open to some objection by reason of uncertainty but not nearly so much as the paragraph in question. It would at least do away with the possibility of favoring or discriminating against the contractor after the contract was awarded. We believe it would be a much better way to specify quantities than to provide in the specifications for any quantity up to double the amount contracted for.

We therefore recommend that the paragraph be eliminated from the specifications.

Yours very truly,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,
Corporation Counsel.

FEBRUARY 15, 1915.

In re INTERPRETATION OF SECTIONS 23 AND 24 OF THE ORDINANCE CREATING A BUREAU OF FIRE PREVENTION AND PUBLIC SAFETY.

HON. J. C. McDONNELL,

Chief Bureau of Fire Prevention and Public Safety.

Dear Sir:

We acknowledge receipt of your communication to this department of January 25, 1915, in which you ask for an opinion on the following matters:

An interpretation of Section 23 of the fire prevention ordinance as to whether or not you can enforce the installation of a sprinkler equipment in the basement of a building not specified in Section 24 (c) unless more than fifty per cent of the space is used for the storing of combustible merchandise.

As we interpret Section 23, its design and object is only to define when a basement for the purpose of the fire prevention and public safety ordinance is to be considered a basement or as a separate story of a building.

When that fact is determined, then it is used in connection with and interpreting Section 24 of said ordinance. That

is to say, in case a building consisted of two stories and a basement occupied as stated in Section 23, instead of regarding it as a two-story building you are authorized by Section 23 to call it a building of three stories.

Therefore, we are of the opinion that Section 24 of the fire prevention ordinance as amended July 21, 1913, Journal of the Council Proceedings, page 1624, authorizes the installation of a sprinkler system:

FIRST: In all non-fireproof stables more than three stories high, if occupied in part for living rooms.

SECOND: In the basements and sub-basements of all non-fireproof buildings three or more stories in height used for the purpose of Class I, when the ground area is four thousand square feet or over—this includes basements and sub-basements of stables, they being buildings of Class I.

Yours, truly,

M. W. CAGNEY,

Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,

Corporation Counsel.

FEBRUARY 16, 1915.

In re ANNEXATION OF "NO-MAN'S LAND" ADJOINING MORGAN PARK.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

Some time ago you made inquiry as to whether any step could be taken by which the property ordinarily spoken of as "No-Man's Land" adjoining what was formerly the Village of Morgan Park, and which is now entirely within the limits of the city, could be annexed to the city.

The writer stated in answer to this inquiry that there was no method prescribed by statute by which this could be done in case the owners of same and legal voters residing thereon failed to take the initiative and petitioned for such annexation. Since then information has been received to the effect that it is now proposed to erect a tank for the storage of oil on that property in a manner contrary to the city ordinances.

It is quite likely also that other things of this kind will be done in the near future, so that the question of extending municipal authority over same will soon become a matter of great importance. We therefore write in order to explain the situation fully to you.

There are two distinct annexation acts. The later act, passed in 1889, provides for the annexation of cities, incorporated towns and villages, or parts of same, through the medium of a vote of the two municipalities affected, and is complete in itself. The earlier act, passed in 1872, was evidently intended originally to cover all forms of annexation and disconnection of territory, although it was incomplete in many respects, even if the whole of the act had been constitutional. Under this earlier act, if it were still in force as originally enacted and if it was constitutional, a way would be provided for taking over a piece of territory like the one in question by means of a proceeding instituted in the Circuit Court.

The Supreme Court, however, in the case of *City of Galesburg v. Hawkinsop*, 75 Ill. 152, decided that the annexation and disconnection of territory was a legislative and not a judicial function, and held that a proceeding instituted to disconnect territory was not within the jurisdiction of the Circuit Court. Although the act in its entirety continued to appear in Hurd's Revised Statutes from year to year, we were forced to regard Sections 3 to 8, inclusive, of this act as unconstitutional and of no force whatever. At the last session of the legislature, the people of that portion of Evanston which has just been annexed to the City of Chicago succeeded in having that act amended in such a way as to wipe out the old Section 3, which provided for such annexation of territory on petition of the city, and substituting therefor the provision under which this Evanston territory was just annexed.

Consequently, even though we were disposed at this time to again make a test of the constitutionality of the sections above referred to, we would be unable to do so, because Section 3, on which the action would have to be based, is now no longer in existence.

The way the law now stands, no method whatever is provided for annexing unincorporated territory except on pe-

tion in writing signed by a majority of the legal voters and by a majority of the property owners in such territory. And, moreover, by the insertion of the new Section 3 and the wiping out of the old Section 3, Sections 4 to 8, inclusive, are to all intents and purposes also wiped out.

You will observe, therefore, that the law as it stands is incomplete and does not cover what it was intended to cover when enacted. There seems to be no way of getting around this difficulty except by the passage of a new act.

Notice of the fact that this act is incomplete is forced upon us from time to time. It has arisen again in the matter of the proposed annexation of territory comprising thirteen acres between Nieman and Devon avenues along Milwaukee avenue. The sole owners of this tract wish to have it annexed to the city, and have introduced a petition in the Council designed to be in conformity with Section 1 of the Act of 1872, but, inasmuch as there are no legal voters residing on the territory, the petition is insufficient.

We cannot assume that the legislature contemplated that where there were no legal voters such a petition need only be signed by the owners of the property, because in the former Section 3 it was provided that there would have to be at least 150 inhabitants before such annexation could be effected unless it happened to be territory intervening between the city and another municipality desiring to become annexed. It is therefore quite plain that such a petition as has been presented to the City Council could not be acted on so that annexation thereunder would be lawful.

We bring these matters to your attention in order that you may indicate whether you desire a bill to be drafted which would do away with the present defects in the law.

Yours respectfully,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,
Corporation Counsel.

FEBRUARY 17, 1915.

Re COMPENSATION DUE THE CITY OF CHICAGO FROM CHICAGO
TUNNEL COMPANY FOR THE YEAR 1913.

HON. MICHAEL ZIMMER, City Comptroller.

Dear Sir:

Your communication of August 19th last in respect to the compensation due the City of Chicago from the Chicago Tunnel Company for the year 1913 on certain items therein mentioned, has been held by this department awaiting receipt of further information requested of Mr. Willard in regard to the matters involved in your inquiry.

1. *Re* Company's receipts from "Operation of Signal System."

The company, in its letter to you of August 13th, states that the signal systems in question were installed by stock exchange brokers at their expense between their offices and their representatives on the floor of the stock exchange and are owned by the brokers and operated by means of power purchased by them from the Commonwealth Edison Company and that the signal systems have no connection with the Chicago Tunnel Company's telephone plant; that the Tunnel Company's electrical engineer, at the request of the brokers, arranged the details and supervised the installation of the systems and that the payments made by the brokers to the Tunnel Company were on account of said services rendered by the company's engineer and are not revenue due to the operation of the company's telephone plant.

Section 7 of the Illinois Telephone and Telegraph Company's ordinance of February 20, 1899, under which ordinance as amended the Chicago Tunnel Company is operating its telephone business, provides that the company shall pay as annual compensation into the treasury of the City of Chicago certain specified percentages "of its gross receipts from the operation of its plant."

We do not think that the language of the ordinance can properly be construed to limit the gross receipts upon which the company is required to pay compensation to the city to the compensation received by the company for the use of its

telephone wires, apparatus and appliances. We are of the opinion that the language "receipts from the operation of its plant," as used in the ordinance, includes also compensation received by the company for any service rendered by it growing out of or by reason of the operation of its telephone plant.

Assuming the accuracy of the company's statement as to the receipts from operation of signal system, we consider such receipts to be "receipts from the operation of its plant," and are of the opinion that the same should be included in the company's gross receipts upon which the city is entitled to compensation under the terms of the ordinance.

2. *Re "Commissions Paid Subscribers."*

The company's letter to you of August 13th, states that the item "Commissions Paid Subscribers" on Bill No. F-1621 rendered by your department to the company, represents that part of the coin deposited in the coin box at pay stations in excess of the rate per call as per contract, and that the company has agreements in which the subscriber is entitled to 50 per cent of the coins deposited in the coin box.

We have before us a copy of the printed form of the contract which we are informed is in use by the company. This form of contract sets out (among other things) the terms for the various classes of service. The following paragraph appears therein: "3. On pay station service, the subscriber agrees to pay for outgoing calls at the rate of a nickel (5 cents) each, the subscriber to be credited for all valid coins deposited in the coin box but to be charged with all slugs or counterfeit coins."

It appears, therefore, that the contract rate for pay stations is five cents for each outgoing call. If the company has an agreement or arrangement with the party in whose premises pay station 'phones are installed, to pay him an amount equal to 50 per cent of the value of the coins deposited in the coin box, such payment must, in our opinion, be regarded as compensation or commission paid to such party for the space, service, etc., furnished in connection with such pay station 'phone.

We are informed by your department that the amounts

paid to the pay station 'phone subscriber from the receipts in the coin box are entered in the account books of the company under the heading of "Commissions." It further appears from your communication that the accounting system of telephone companies throughout the country recognizes the total amount of the money deposited in the coin boxes as receipts and treats the amounts paid to the subscribers by the company as a commission.

We are of the opinion that the company's gross receipts, upon which the city is entitled to a percentage as annual compensation, should include the total amount deposited in the pay station coin boxes, and that in determining such gross receipts the commission, $2\frac{1}{2}$ cents for each nickel deposited in the coin boxes, should not be deducted from the total amount deposited.

Yours very truly,

BRYAN Y. CRAIG,

First Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,

Corporation Counsel.

FEBRUARY 17, 1915.

In re FRONTAGE CONSENTS FOR LOCATION OF A SALOON AT A
DIFFERENT LOCATION IN THE SAME BLOCK.

MESSRS. PEDEN, KAHN & MURPHY,

9103 Commercial Avenue,

South Chicago, Illinois.

Gentlemen:

We are in receipt of your communication of the 16th inst., stating that your client who now conducts a saloon at the northeast corner of Strand and 89th streets is contemplating moving his saloon to the east side of Green Bay avenue in the same block in which his present saloon is located. You inquire whether a new petition of property owners and householders will be required under the circumstances before your client can obtain a license to keep the saloon at the proposed new location.

The signers of the petition accompanying the application

for the license to keep the saloon at its present location consented to the keeping of a saloon at that particular location. The same property owners who signed the petition might be entirely unwilling to have a saloon kept at the new location, although it is within the same block.

Moreover, the ordinance requires that the application for a license be signed not only by a majority of the property owners, but that it shall also be signed by a majority of the *bona fide* householders and persons or firms living in, or doing business on each side of the street in the block upon which such dramshop shall have its main entrance. The present dramshop doubtless has its main entrance on either Strand or 89th street. If, for example, the main entrance is on Strand street the only *bona fide* householders, etc., who would be qualified to sign the application would be the householders and persons or firms living in, or doing business on each side of Strand street between 89th and 90th streets. If the saloon should be moved to Green Bay avenue, the consent of the householders, etc., on Strand street to the keeping of the saloon on Green Bay avenue would not be required, nor would their consent or signatures on the petition add any strength to the application. An entirely new set of householders, etc., would be required on the application for a license to keep the dramshop on Green Bay avenue, namely (if the main entrance was on Green Bay avenue), a majority of the *bona fide* householders and persons or firms living in, or doing business on each side of Green Bay avenue between 89th and 90th streets.

For the reasons above stated, it is manifest that a new petition will be required in order to obtain a license to keep the saloon at the proposed new location on Green Bay avenue.

Yours very truly,

BRYAN Y. CRAIG,

First Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,

Corporation Counsel.

FEBRUARY 18, 1915.

In re PROPOSED ORDINANCE REQUIRING CONTRACTORS TO GIVE
PREFERENCE IN HIRING LABOR, TO PERSONS RESID-
ING IN CHICAGO.

HON. FRANCIS D. CONNERY, City Clerk.

Dear Sir:

In this matter you ask us, in your letter of the 27th ult., to advise you whether an ordinance drafted in conformity with the recommendation contained in paragraph 3 on page 55 of the report of the Chicago Municipal Markets Commission would be valid.

The recommendation in question, so far as material to be here quoted, is as follows: "Contractors furnishing municipal supplies or doing public work for the city should be compelled to give preference to competent resident unemployed workers."

The question therefore is, would an ordinance requiring contractors with the city, in hiring labor, to give a preference to the class of laborers herein indicated be valid.

Under such conditions as obtain today in the City of Chicago, such an ordinance would practically amount, at least as to certain classes of labor, to forbidding contractors to hire others than competent resident unemployed workers.

This question of the power of the city by ordinance to compel its contractors to hire only certain classes of laborers has been before this office several times already. In an opinion written by the undersigned on the 16th of May, 1914, and published in the volume containing the opinions from January 1, 1913, to October 5, 1914, at page 866, several of the former opinions of this office in regard to this matter are reviewed, and the authorities are collected. It would serve no useful purpose to do this over again in this opinion.

In the case of *City of Chicago v. Hulbert*, 205 Ill. 346, decided in December, 1905, the question was whether certain provisions of a statute known as the Aliens Act prohibiting the employment of alien laborers if they are to be paid from funds raised by taxation, were valid. The court said in its opinion (page 364):

“ ‘A similar law was enacted by ordinance in the City of Chicago, and we have repeatedly held that such law is invalid, as it is in contravention of the constitution and the right of individuals to contract. The statute in question is void upon the same grounds, and neither the city nor the contractor was under any obligation to observe it.’ ”

It is true that in this case, and in the other cases cited in the opinion above referred to, the law or ordinance positively prohibited the hiring of any laborers belonging to the excluded class. Here the proposed ordinance would only direct a preference to be given to laborers belonging to the favored class. But, for the reason above suggested, it seems to me that the principle laid down in these cases would clearly cover the case under consideration, and would invalidate such an ordinance as you suggest.

I therefore answer your question in the negative.

Yours respectfully,

WILLIAM DILLON,
Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,
Corporation Counsel.

FEBRUARY 24, 1915.

In re SALE OF FLOWERS AT ELEVATED STATIONS.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

In response to your request for information concerning the right of the city to prevent flower venders from occupying the stations of the South Side Elevated Railroad at 47th and 55th streets, we beg to submit the following

The question of the rights of the city in regard to the use of stations for purposes of selling newspapers and periodicals, for displaying advertising matter, etc., has at various times received thorough consideration in this department, and numerous opinions have been written in reference thereto. The gist of these is to the effect that while the elevated railroad companies have no right, under their charters, to use stations for the purpose of vending merchandise or for ad-

vertising purposes, nevertheless, where they are located on private ground, the city, in the absence of an ordinance to that effect, can prevent them from doing so only through the means of a suit in *quo warranto* instituted through the State's Attorney.

We have ascertained that the stations at 47th and 55th streets are both located on private ground. Consequently, nothing can be done by the police to prevent the sale of flowers at these places. An action of *quo warranto* might be instituted, but, as stated above, that would have to be done through the State's Attorney, or the Attorney General of the state, and the enforcement of any order of court entered in such a suit would be in the hands of the state authorities.

Yours respectfully,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,
Corporation Counsel.

FEBRUARY 26, 1915.

In re CHECKING TELEPHONE CALLS ON MEASURED SERVICE.

HON. MONTAGUE FERRY,

Commissioner of Public Service.

Dear Sir:

In reply to your request of the 9th inst., for an opinion as to whether or not the method used by the Chicago Telephone Company in checking calls on measured service lines without giving the subscriber a means of checking the telephone company's record is entirely legal and whether or not this constituted taking of property without due process of law, we beg to advise you that the subscriber has the privilege of checking the calls by making a pencil notation or otherwise and the fact that the telephone company does not furnish the means by which the subscriber can check such calls neither makes the method illegal or constitutes taking of property without due process of law.

As to your second question concerning the legality of the provision in the telephone ordinances defining a single

call as a conversation over a line of five minutes, we beg to advise you that such a provision is legal.

Very truly yours,

LORING R. HOOVER,
Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,
Corporation Counsel.

FEBRUARY 24, 1915.

In re POWER OF THE CITY OF CHICAGO TO SUPPLY WATER
THROUGH A TWELVE INCH PRIVATE MAIN TWO MILES
BEYOND THE CITY LIMITS AT 67TH STREET AND
CICERO AVENUE, TO THE CHICAGO & WESTERN INDI-
ANA RAILWAY COMPANY.

HON. L. E. MCGANN,
Commissioner of Public Works.

Dear Sir:

In answer to your letter of January 22, 1915, also signed by H. L. Lucas, Superintendent Water Pipe Extension Department, and John Ericson, City Engineer, requesting to be advised whether the Department of Public Works was authorized under the ordinances of the City of Chicago to grant and furnish a supply of water to the Chicago & Western Indiana Railway Company, outside of the city limits, at 67th street and Cicero avenue, we beg leave to state that we have investigated this matter and find that on September 21, 1914, a permit was issued to George W. Groll, a licensed plumber acting as the agent for said railway company, for a connection to the city water main on the east side of Cicero avenue, 355 feet south of 67th street.

It appears from the plat filed in connection with this matter that a 12-inch private water main was connected with the city water main at the point above mentioned, and that the meter attached to the 12-inch private water main is on the city side of Cicero avenue, and controls the water supply running into the railroad and switch yards of said company. It also appears from this plat that this 12-inch private water main extends west two miles beyond the city limits and sup-

plies water to railroad tanks, penstocks, and roundhouse and other buildings belonging to the Chicago & Western Indiana Railway Company outside of the city limits.

We notice from an inspection of the original application for a permit to make this water connection filed by George W. Groll, a licensed plumber, that it was disclosed, as was necessary, to the water department, what kind of premises were to be supplied and for what purpose the water was to be used; but from the plat it does not clearly appear whether the water to be supplied was to be used entirely outside of the city limits, or partly within and partly without the city limits. However, in the main, there seems to have been a substantial compliance with Section 2735 of The Chicago Code of 1911, which deals with the subject of applications for city water, and among other things, says that:

“Such application shall set out the full name and address of the applicant, and shall state fully all purposes for which a water supply is desired or for which it is desired to tap such water main or make connection with such service or supply pipe, and such applicant shall be required to answer truthfully all questions which shall be put to him by the Commissioner of Public Works or any officer or employe of the Bureau of Water relating to such application or to the use to be made of the water to be supplied to such applicant.” * * *

Section 254, page 337 (Hurd's Revised Statutes of the State of Illinois of 1913), of AN ACT AUTHORIZING CITIES, INCORPORATED TOWNS AND VILLAGES TO CONSTRUCT AND MAINTAIN WATERWORKS. (Approved and in force April 15, 1873), is in part as follows:

“That all cities, incorporated towns and villages in this State, be and are hereby authorized and shall have power to provide for a supply of water for the purposes of fire protection, and for the use of the inhabitants of such cities, incorporated towns or villages by the erection, construction and maintaining of a system of water works or by uniting with any adjacent city, incorporated town or village, in the erection, construction and maintaining of a system of water works for the joint use of such cities, incorporated towns or villages, or by procuring such supply of water from any adjacent city, incorpo-

rated town or village already having water works.”
* * *

Section 270a, page 341, (Hurd's Revised Statutes of the State of Illinois of 1913), of AN ACT (UTHORING CITIES, TOWNS AND VILLAGES TO BUILD, PURCHASE OR EXTEND WATERWORKS SYSTEMS FOR PUBLIC AND DOMESTIC USE, AND TO PROVIDE FOR THE COST THEREOF. (Approved April 22, 1899, in force July 1, 1899), is in part as follows:

“Every city, incorporated town and village in this State, is hereby authorized to acquire waterworks for supplying water for public use, and for domestic use of its inhabitants by building or purchasing a waterworks system or enlarging or extending an existing system.” * * *

Section 368, page 366 (Hurd's Revised Statutes of the State of Illinois of 1913), of AN ACT ENTITLED “AN ACT TO CREATE SANITARY DISTRICTS AND TO REMOVE OBSTRUCTIONS IN THE DES PLAINES AND ILLINOIS RIVERS.” (Approved May 29, 1889, in force July 1, 1889), is as follows:

“Whenever in any such sanitary district there shall be a city, incorporated town or village, which owns a system of waterworks and supplies water from a lake or other source which will be saved and preserved from sewage pollution, by the construction of the main channel drain, ditch or outlet herein provided for, and the turning of the sewage of such city and district therein, and there shall be in such sanitary district any territory bordering on any such city, incorporated town or village within the limits of another city, incorporated town or village which does not own any system of waterworks, at the time of the creation of such sanitary district, then upon application by the corporate authorities of such latter named city, incorporated town or village the corporate authorities of such city, incorporated town or village having such system of waterworks shall furnish water at the boundary line between such municipalities by means of its waterworks to the corporate authorities asking for the same in such quantities as may be required to supply consumers within said territory, at no greater price or charge than it charges and collects of consumers, within its limits for water furnished through meters in like large quantities.”

It will be seen from an observation of the above statutory

provisions that no duty or obligation rests upon the city to furnish water outside of the city limits; nor is any express power or right granted and conferred upon the city to do the same. On the other hand, there is nothing in the statutes expressly prohibiting the city from furnishing water outside of its limits.

The question as to the right of a city to sell electricity and water outside of the city limits has been passed upon by the courts of Kentucky.

In construing paragraph 5, Section 3290 of the Kentucky Statutes of 1903 (similar to our Illinois provisions above quoted), which is as follows (giving the common council power) :

“To provide the city and the inhabitants thereof, with water, light, power, heat and telephone service, by contract, or by works of its own, located either within or beyond the boundaries of the city. To make regulations for the management thereof, and to fix and regulate the prices to private consumers and customers,”

in the case of *City of Henderson v. Young*, 119 Ky., p. 227, where a taxpayer of the City of Henderson instituted injunction proceedings against the city to prevent from furnishing to property outside of the city limits an electric light current from the electric light plant belonging to the City of Henderson, the court, on page 227 thereof, says :

“A city has two classes of powers—one legislative and governmental, in the exercise of which it is a sovereignty and governs its people; and in the exercise of this class of powers the statute must be strictly construed. The other class of powers is conferred upon it for the purpose, not of government, but for private advantage to the city and its inhabitants. In the exercise of these powers it is governed by the same rules that govern private individuals or corporations. See Dillon’s *Municipal Corporations* (3d Ed.) 36, and authorities cited in note. In the management and operation of its electric plant a city is not exercising its governmental or legislative powers, but its business powers, and may conduct it in the manner which promises the greater benefit to the city and its inhabitants in the judgment of the City Council; and it is not within the province of the court to interfere with the reasonable discretion of the council in such matters.”

In the following case, William Henderson owned a farm adjacent to the City of Wyckliffe, and desired that the city furnish him with water upon a certain contract which was to continue for a period of fifteen years, Henderson agreeing to pay all expenses for the tapping of the main and the maintaining of it, etc. The appellant, Rogers, instituted an action to enjoin the city from carrying out the contract and diverting the water from the city, contending that the water had been provided for the use of the people of the city, and that it did not by its Council or Mayor have the power or authority to furnish the water to Henderson outside of the city. The lower court sustained a demurrer to his petition. The Court of Appeals in deciding this case referred to and cited the case of *City of Henderson v. Young*, 119 Ky., page 226, as an authority and as being conclusive of the case in question, and says that the power above referred to:

“Applies to furnishing water by a city as well as electricity.”

“The contract with Henderson appears from its terms, to be a beneficial one for the city. If, however, it was made to appear that to furnish Henderson there would not be sufficient water remaining to supply the residents of the city, the case would be different.”

Rogers v. City of Wickliffe, 29 Ky. L. R., p. 588.

We are of the opinion that the Kentucky cases lay down the correct doctrine and the City of Chicago has the right in its discretion to furnish water outside of the city limits, providing the water requirements of the city for itself and inhabitants are not prejudiced thereby.

Inasmuch as each application for water for use outside of the city limits must necessarily require a determination of the question as to whether the particular application can be granted without interfering with the adequacy of the water supply of the city or its inhabitants, and also whether it would be to the interest of the city to grant the application, and also, inasmuch as the city, in granting any such application, should be fully protected in the matter of the right to cease furnishing the water at any time, and otherwise, we consider it advisable that no contract or agreement in respect to furnishing water outside of the city limits should be entered

into without an ordinance of the City Council authorizing the same with the power of revocation and discontinuance of said water supply at any time.

In view of the foregoing, we are of the opinion that Council action should be had in respect to the matter of supplying water to the Chicago & Western Indiana Railway Company outside of the city limits, at 67th street and Cicero avenue.

Respectfully submitted,

J. J. VITERNIA,

Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,

Corporation Counsel.

FEBRUARY 24, 1915.

In re WITHDRAWAL OF SIGNATURES TO FRONTAGE CONSENT PETITION FOR LOCATION OF A LAUNDRY.

HON. HENRY ERICSSON,

Commissioner of Buildings.

Dear Sir:

We are in receipt of your communication of this date in regard to permit issued by your department for the erection of a building for laundry purposes at 2001-2005 Stave street, 2012-2016 Bingham street and 2528 Armitage avenue.

It appears from your communication that accompanying the application for the permit was a petition consenting to the erection of said laundry, which petition was signed by persons owning a total of 41.44 feet more than one-half of the property according to frontage on both sides of the streets upon which the proposed laundry fronts.

It further appears that the signature of James Fitzgerald upon the petition is invalid; said Fitzgerald owned a frontage of 25 feet. Deducting the Fitzgerald frontage from the surplus of 41.44 feet, leaves a surplus of 16.44 feet.

It further appears that your department on February 9th, 1915, issued the permit for the erection of said building for laundry purposes and that at the time of the issuance of the permit the petition on file in your office contained valid

signatures of persons owning a surplus of frontage amounting to 16.44 feet. On February 13, 1915, there was presented to your office a withdrawal of the consent of James Kennelley, who had signed the said petition and who was the owner of 25 feet of frontage.

You ask to be advised as to whether, under the circumstances stated, you have the right to revoke the permit issued on February 9, 1915.

The law is well established that the act of signing a petition of the kind in question is not irrevocable and that a signature thereto may be withdrawn if the withdrawal is made in apt time.

It is equally well settled that the withdrawal, to be availing, must be made before the person or body authorized to act upon the petition has acted thereon.

Littell v. Supervisors, etc., 198 Ill. 205.

Theurer v. The People, 211 Ill. 296.

The permit having been issued by your department on February 9, 1915, at which time written consents of a majority of the property owners according to frontage were on file in your office, we are of the opinion that property owners who had signed the petition or consent to the erection of the laundry could not thereafter withdraw their signatures or consent. The attempted withdrawal of Mr. Kennelley's consent, four days after the issuance of the permit, was therefore ineffective and would not afford any basis for a revocation of the permit issued on February 9, 1915.

We are returning the petition and verification report of the Superintendent of Maps.

Yours very truly,

BRYAN Y. CRAIG,

First Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,

Corporation Counsel.

FEBRUARY 25, 1915.

In re EFFECT OF CHANGE IN FIRE LIMITS ON ESTABLISHED LUMBER YARDS.

HON. OLIVER L. WATSON,

Alderman of the 27th Ward.

Dear Sir:

We acknowledge receipt of your communication of January 9, 1915, to this department. An opinion is requested as to what effect an ordinance amending and extending the fire limits will have upon lumber yards now without the fire limits.

As the ordinance now stands, frontage consents are necessary in residence neighborhoods within the fire limits, and the specific question is asked whether or not a lumber yard now in existence outside the fire limits will necessarily have to secure frontage consents upon the adoption of the proposed pending ordinance extending the fire limits.

You also state the object is to ascertain whether or not a certain lumber yard in the northwest part of the city can be required to vacate its present site upon the extension of the fire limits, as the neighbors near the same are anxious to get rid of the yard.

Any proposed ordinance cannot be legally drawn or predicated with the specific object of reaching a certain individual, firm or corporation. An ordinance affecting lumber yards must be general. It must apply to all lumber yards similarly situated.

The power of regulating lumber yards is given to the city by clause 93, Section 1 of Article V of the Cities and Villages Act, which is as follows:

“To regulate and prohibit the keeping of any lumber or coal yard, and the placing or piling or selling any lumber, timber, wood, coal or other combustible material, within the fire limits of the city.”

Under the above grant of power, Section 664 of The Chicago Code of 1911, as amended, is now in force, which is in part as follows:

“No person or corporation shall establish, maintain, conduct or operate within the fire limits of the city as

the same are now or may hereafter be defined by ordinance, any lumber yard * * *"

The above ordinance in substantially the same form, was held to be a valid enactment in the case of *City of Chicago v. Ripley*, 249 Ill. 466.

Specifically answering your question as to whether or not frontage consents will necessarily have to be obtained by already established lumber yards now without the fire limits, but which will be included in the fire limits upon the adoption of an ordinance extending the same, we are of the opinion that said established lumber yards will be required to obtain frontage consents. Under an interpretation of a frontage consent ordinance having substantially the same operative words in the case of *People v. Village of Oak Park*, 266 Ill. 365, in which case the validity of an ordinance requiring frontage consents for public garages was before the court, said ordinance was in part as follows:

"SEC. 1. It shall not be lawful for any person or corporation to locate, build, construct or maintain in the Village of Oak Park, on any site where two-thirds of the buildings within a radius of 500 feet of the proposed site are used exclusively for residence purposes, a building for a public automobile garage * * * without the written consent of a majority of the property owners, according to frontage, within a radius of 500 feet of the proposed site of said building."

It was contended that it was invalid because it discriminated between garages already established and those established after the passage of the ordinance; but the court on page 371 ruled as follows:

"Neither do we think the ordinance void because it discriminates in favor of those persons engaged in a like business at the time the ordinance became effective, December 19, 1912. The ordinance clearly states 'it shall not be lawful for any person or corporation to locate, build, construct or maintain.' This, in our opinion, as clearly applies to public garages then in operation as to those to be subsequently opened. Any failure of the city authorities of Oak Park to enforce the terms of the ordinance does not render the ordinance void."

Inasmuch as the phraseology, "It shall not be lawful for

any person or corporation to locate, build, construct or maintain," used in the ordinance under consideration in the case of *People v. Village of Oak Park, supra*, is so nearly like the words used in Section 664, as above quoted, namely, "Shall establish, maintain, conduct or operate," we are of the opinion that upon the extension of the fire limits the already established lumber yards in residence districts in territory covered by the proposed extension of the fire limits would be required to obtain frontage consents.

Yours very truly,

M. W. CAGNEY,
Assistant Corporation Counsel.

Approved:

BRYAN Y. CRAIG,
Acting Corporation Counsel.

February 25, 1915.

In re USE OF TRACTION FUND FOR CONSTRUCTION OF TUNNELS.
HON. EUGENE BLOCK, Chairman, Committee on Local Transportation.

Dear Sir:

In your letter of February 11, 1915, addressed to John W. Beckwith, Corporation Counsel, you ask us to render an opinion as to whether the traction fund may be used to pay for the cost of a tunnel designed for vehicular and pedestrian traffic as well as for street railway traffic in connection with the proposed tunnel under Ashland avenue, from Clybourn place to Fullerton avenue.

In an opinion dated February 3, 1915, addressed to you, we discussed the question as to whether the traction fund could be used for the establishment of passenger omnibus lines. In this opinion we held that the City Council reserved the right by appropriate action at any future time to apply and use the traction fund for this purpose.

What we said concerning the right of the city to use the traction fund for the establishment of passenger omnibus lines applies to the right of the city to use the traction fund to pay the cost of a tunnel designed for vehicular and pedestrian traffic in connection with the proposed tunnel under Ashland

avenue from Clybourn place to Fullerton avenue, and we are of the opinion that the City Council may, by appropriate action, apply the traction fund for the purpose of paying the cost of a tunnel designed for vehicular and pedestrian traffic in connection with the proposed tunnel under Ashland avenue from Clybourn place to Fullerton avenue.

Yours very truly,

MAX M. KORSHAK,

Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,

Corporation Counsel.

March 1, 1915.

In re ACCEPTANCE OF VOLUNTARY CONTRIBUTIONS FOR PAYMENT OF CITY EMPLOYEES.

HON. MICHAEL ZIMMER, Comptroller.

Dear Sir:

Your letter of the 19th instant, in which you enclose a letter from Frank P. Danisch, Clerk of the Municipal Court, on the subject of the acknowledgment of chattel mortgages by power of attorney, has been handed the undersigned for reply.

From the information contained in your correspondence and conversations had with the Clerk of the Municipal Court, I am advised that it has been the custom of the Clerk of the Municipal Court to acknowledge various chattel mortgages when executed by power of attorney. Our Appellate Court has recently declared that such acknowledgments by power of attorney are invalid.

To avoid bringing their numerous customers to the clerk's office to have chattel mortgages acknowledged, it is the desire of various instalment furniture houses, piano, cash register dealers, etc., in order to meet the situation created by this decision, to have the clerk appoint deputy clerks to take acknowledgments on the premises of such dealers. The Municipal Court, after conferring with representatives of these dealers, ordered its clerk to appoint a number of deputy clerks to take these acknowledgments at certain instalment furniture, piano, cash register, etc., establishments. The order fixes the

salary of such deputy clerks at \$1 per annum. Since there has been no money appropriated to pay the salaries of such clerks, it has been suggested that the various dealers deposit with the city a sum sufficient to pay the same. This the dealers are willing to do, and the matter has been submitted to you to ascertain whether you will accept such deposit from them and pay out the amount thereof when a payroll is issued therefor by the Clerk of the Municipal Court.

You ask an opinion as to whether you may legally accept such deposits. The paying of this money into the city treasury by said merchants would be a gratuitous act amounting to a donation or gift to the city. I have failed to find a case in our courts where the facts are similar, and it is perhaps unusual for the public to donate to the city money with which to pay the salary or expenses thereof; however, the text books seem to hold that the city may accept money by gift for its corporate purposes. See McQuillin on Municipal Corporations, Sec. 1118.

Mr. Dillon, in his work on Municipal Corporations, says, Section 981:

“Municipal and public corporations *may be the objects of public and private bounty*. This is reasonable and just. They are in law clothed with the power of individuality. They are placed by law under various obligations and duties. Burdens of a peculiar character rest upon compact populations residing within restricted and narrow limits, to meet which property and revenues are absolutely necessary, and, therefore, legacies of personal property, devises of real property and grants or gifts of either species of property directly to the corporation for its own use and benefit, intended to and which have the effect to ease it of its obligations or lighten the burdens of its citizens, are, in the absence of disabling or restraining statutes, valid in law.”

It has also been held that the city has power (at common law) to take personal property by bequest.

Matter of Crane's Will, 12 App. Div. (N. Y.) 271; 42 N. Y. S. 904.

Since the city may accept personal property by bequest for corporate purposes, as held in the Crane's Will case (*supra*), it would seem to be a logical conclusion that it might

accept money to pay salary of its officers or employes. If, therefore, these dealers find it to their interest to donate to the City of Chicago a sum sufficient to pay the salaries of these various persons, it is my opinion that you have a perfect legal right to accept this amount from them to be paid out for the purposes for which the same has been donated.

Yours very truly,

LOUIS SALINGER,
Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,
Corporation Counsel.

March 1, 1915.

In re DRAFT OF A SUBSTITUTE ANNEXATION ACT.

HON: CARTER H. HARRISON, Mayor.

Dear Sir:

In pursuance of your directions we have prepared a bill for an act providing for the annexation of unincorporated territory to cities and unincorporated towns.

As pointed out to you in a former letter, the act under which unincorporated territory may now be annexed is so badly mutilated and its effectiveness is so completely destroyed by reason of court decisions, amendments and other matters affecting same, that it would be useless to try and amend it.

We have, therefore, drafted the new bill so as to make it a complete act of itself and have provided for the repeal of the old act.

The writer tried to see you for the purpose of getting your views in regard to the provisions to be inserted, but was unable to get the necessary information in time to be available for this purpose if the new bill was to be presented at the session of the City Council to be held on this date.

We have, however, drafted the new bill so as to make provision for annexing the territory known as "No Man's Land" by three-fourths vote of the City Council, and also for preventing such a condition from arising in the future. Further, we have prepared the bill so as to require submission of an-

nexation questions to the voters in all cases except in the case of such intervening territory and in the case of small areas not exceeding 20 acres and having no more than 10 legal voters residing thereon.

We have eliminated the provision for the annexation of incorporated territory less than 160 acres in extent which was inserted in this act for the purpose of enabling the annexation of the portion of Evanston which has just been taken in.

This provision has no place in this law as it now stands, and if it is desired to have any such provision it should be inserted in the law relating to the annexation of incorporated territory.

The latter act does not permit of the annexation of less than one-half square mile. In view of the complications that are bound to arise in cases where the territory of one municipality is added to another it does not seem advisable to provide for the annexation of less than one-half square mile. However, if you regard such a provision as a good one, we can draft amendments to that act to meet your views.

The parties who secured the passage of the act authorizing annexation in the case of such smaller areas of unincorporated territory themselves state that it was done only for the purpose of the Evanston territory, and that it was urged at the time of the passage of same that this law could be repealed immediately after annexation was effected thereunder. In view of the suggestions made along this line we have not deemed it proper to draft amendments to the act providing for annexation of incorporated territory and will not do so unless you desire it.

We forward the draft of the act prepared as above herewith and return our letter of February 16, 1915. We also enclose a letter of transmission.

Yours respectfully,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

BRYAN Y. CRAIG,
Acting Corporation Counsel.

March 2, 1915.

In re JUDICIAL ELECTIONS.

HON. OTTO KERNER, Chairman, Committee on Judiciary, Etc.

Dear Sir:

Some time ago you referred to this department an order directing the Committee on Judiciary to take up for consideration the preparation of a bill to be submitted to the General Assembly amending the statutes in such a manner as to establish a judicial election day apart from the regular elections now provided for by the statutes. When the matter was considered by your committee, it was determined that if it was possible to frame a law bringing all judicial elections together on one day, this should be done. The writer stated at the time that he believed it would not be possible, but nevertheless he was requested to look into the matter and see whether it could not be brought about.

After full consideration, we have come to the conclusion that such a plan is not possible unless the constitution of the state is altered, as will appear from the references made below showing how the terms of office of the various judges and the times of election for same are now established in such a way that they cannot be made to coincide.

The constitution requires that judges of the Supreme Court shall hold their offices for nine years and that their election shall take place on the first Monday in June. It also fixes the term of Circuit Court judges at six years and the election day on the first Monday in June. The constitution also establishes the original Superior Court. It created the court and named one of the judges of the Circuit Court and the judge of the Recorder's Court as the judges thereof and provided that the term of office of such judges shall be for six years after their current terms expired. It happens in this way that one of the Superior Court judges who was first elected as a Circuit Court judge is elected in June, but the other, provided for in the constitution, is elected in November.

Since the constitution was adopted, there were several acts passed adding additional judges. The act of April 15, 1875, created additional Superior Court judges up to nine

and provided for their election on the first Tuesday after the first Monday of November, 1875, and every six years thereafter. The act of June 26, 1893, added three Superior Court judges and fixed the election in November, 1893, and every six years thereafter. The act of June 10, 1911, added six Superior Court judges and fixed the election in November, 1911, and every six years thereafter. The acts creating additional Circuit Court judges necessarily fixed the terms of same as originally provided for under the constitution so that all Circuit Court judges are elected at the same time. The act providing for the election of a county judge fixes November, 1882, as the time of election, and provides for election every fourth year thereafter. The act creating the probate judge, passed May 21, 1881, states that the judge shall be elected at the time the county judge is elected and every four years thereafter. The Municipal Court Act provides for an election November, 1906, and every two years thereafter. Any change in regard to this would have to be submitted to a vote of the people of Chicago.

It will be seen from the above that not only is it impossible to change the terms of some of the Superior Court judges so as to bring the election in June, but, aside from that, any act which undertakes to bring all the elections together would necessarily amend a large number of acts. Moreover, the constitution does not permit the enactment of a law which operates to extend the term of office of a judge. In view of these facts, we do not see how it will be possible to provide for a general election day for judges.

In this connection, we beg to call your attention to the fact that the Chicago Bar Association has had under consideration the question of bringing about judicial election days which do not fall on regular election days, and the committee which had the matter in charge has reported a bill that is about to be presented to the Legislature which represents the best work that can be done in reference thereto. Even in this act no attempt is made to change the time for holding elections of judges, and it is evident no way of doing this has been suggested which would be lawful, otherwise it would have been done, because the committee sought earnestly to separate

judicial elections from elections at which political positions are to be filled.

We therefore return the order of the City Council, above referred to, and recommend that the same be placed on file as calling for something which is impracticable.

Yours respectfully,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,
Corporation Counsel.

March 3, 1915.

In re MINIMUM CHARGES FOR CERTAIN TELEPHONE EXTENSION SERVICE.

HON. MONTAGUE FERRY, Commissioner of Public Service.

Dear Sir:

We are in receipt of your communication of February 26th, in regard to the complaint of the Holtzer-Cabot Electric Company, in which you request an opinion as to whether the ordinances of the Chicago Telephone Company compel that company to charge a minimum of \$5.00 per quarter for the service and under the conditions described in your communication, and whether it would constitute a discrimination for the telephone company to charge less than \$5.00 per quarter for such service.

It appears that the Holtzer Company desires to have the telephone company furnish and install a line connecting the switchboard in the Holtzer Company's building with an extension telephone to be installed in premises located on a lot adjoining land owned by said Holtzer Company and about 50 feet from the building occupied by said company.

This class of service is provided for in the first paragraph of subdivision (m) of section 2 of the Chicago Telephone Company's ordinance of May 26, 1913. The provisions of said paragraph in respect to the charge for such service are as follows:

"So long as said terminal or extension telephone or telephones shall be located within one-half mile of said

premises measured by the most direct street distance, said company shall charge at the rate of not to exceed \$5.00 per quarter year, and for each additional one-quarter mile, or fraction thereof, which said terminal or extension telephone or telephones is or are distant from said premises said company may charge not to exceed the rate of \$2.50 per quarter year."

We are of the opinion (1) that the ordinance does not compel the telephone company to charge \$5.00 per quarter year in cases where the terminal or extension telephone is located within one-half mile of the premises of the subscriber, and \$2.50 per quarter year for each additional one-quarter mile or fraction thereof, but that the company may charge such rate as it may determine, but not to exceed \$5.00 per quarter year in the cases first above referred to, and not to exceed \$2.50 for each additional one-quarter mile, or fraction thereof, and (2) that the charge must be uniform to all subscribers.

Under the final paragraph of said subdivision (m) the telephone company may also charge such rate as it may determine, but not to exceed \$1.50 per quarter year for each terminal or extension telephone furnished by it and connected with any switchboard or wire hereinabove referred to. Such charge must also be uniform as to all subscribers.

Yours very truly,

BRYAN Y. CRAIG,

First Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,

Corporation Counsel.

March 5, 1915.

In re USE OF SUB-SIDEWALK SPACE FOR HOUSING OF PUBLIC
UTILITY SERVICES.

HON. WM. J. HEALY, Chairman, Commission on Downtown
Municipal Improvements.

Dear Sir:

We are in receipt of your request for an opinion as to the effect of the recent Supreme Court decision in the Marshall Field case upon the power of the city to use sub-sidewalk space for the location of municipally and privately owned

utilities in the district south of Madison street and west of State street.

In reply we beg to advise you that in our opinion the recent decision of the Supreme Court in no way changes the law controlling the subject-matter of your inquiry, and that where the City of Chicago considers it necessary, and there is a reasonable basis for its determination, it may utilize sub-sidewalk space in any location in the city for the location of municipally and privately owned utilities, even to the exclusion of the use of such space by abutting property owners or their lessees.

This opinion does not treat every phase of the question of the use of the space under streets and sidewalks, inasmuch as your request for an opinion appears not to call for such a discussion. If you desire further information on this subject we will be pleased to furnish the same upon request.

Yours very truly,

LORING R. HOOVER,
Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,
Corporation Counsel.

March 5, 1915.

In re FEES CHARGED FOR CERTIFICATION OF DEATHS TO STATE
BOARD OF HEALTH.

HON. MICHAEL ZIMMER, City Comptroller.

Dear Sir:

We have a communication from your department, signed by L. E. Gosselin, Auditor, dated March 1, 1915, wherein we are requested to advise you on the subject-matter of fees charged for deaths certified to the State Board of Health by the Commissioner of Health of the City of Chicago.

Section 8 of an act requiring reports of births and deaths, etc., approved May 6, 1903, in force July 1, 1903, makes it the duty of the Commissioner of Health to deliver to the State Board of Health at Springfield all reports of deaths presented to him. (See Hurd's Revised Stat. 1905, p. 1885.)

In 1911 the section referred to was amended by adding

the provision that for each death report so made the health official shall be paid the sum of 10 cents. (See Laws of Illinois 1911, page 518.)

Section 10 of the same act as amended in 1911 provides that the fees allowed by Section 8 shall be a charge upon the county in which said fees may accrue, and the county clerk "shall, upon request of any person entitled to said fees in his county, issue to such person his warrant upon the county treasurer of said county for the amount of fees due such person under this act, and the county treasurer of said county shall pay the same upon presentation out of any money belonging to the county not otherwise appropriated." (See Hurd's Revised Stats. 1905, p. 1885. Laws of Illinois 1911, page 518.)

The fees over which the controversy in this instance arises are those allowed and provided for in the foregoing acts of the State Legislature.

In 1905 the City of Chicago adopted an act submitted to its electors commonly known as the "Little Charter," which appears in Hurd's Revised Statutes of 1911 as Article XII of the Cities and Villages Act.

Section 3 of Part 2 of said Article XII is in part as follows:

"Compensation—No Perquisites—Compensation of Chairman of Finance Committee.) §3. The compensation of all officers shall be by salary, as fixed in the annual appropriation bill, by the City Council, and the compensation of no officer shall be altered during the same fiscal year. No officer shall be allowed any fees, perquisites or emoluments or any reward or compensation aside from his salary, but all fees and earnings of his office or department shall be paid by him into the city treasury."

It must be presumed that when the Legislature provided for payment of fees for reporting deaths, in 1911, it had in mind the provision relating to the compensation of officers in the City of Chicago. Section 3 of Part 2 of Article XII of the Cities and Villages Act was not expressly repealed by the act of 1911 relating to the reports of births and deaths. The law does not favor repeals by implication. Both statutes re-

main in force unless they are so repugnant that they cannot operate together. (*Galpin v. City*, 249 Ill. 554, 563; *Hoyne v. Danish*, 264 Ill. 467, 485-486.)

It is true that where two acts are repugnant to each other, the later enactment must control. But are the provisions relating to the fees of health officers for reporting deaths, which were passed in 1911, inconsistent with the provision in the Cities and Villages Act governing the compensation of officers of the City of Chicago, passed in 1905? It must be remembered that the act providing for fees for reporting deaths is general in its scope and applies to all cities and villages in the State of Illinois, while the provision relating to the compensation of officers is a local or special law applicable to the City of Chicago only. It is a rule of statutory construction that a special act will control, although there may be provisions found in a general act which, but for the provisions of the special act, would include the subject-matter covered by the provisions of the special act. (*McGann v. People*, 227 Ill. 567, 570.) This is true, although the general law is passed subsequently. (*East Springfield v. City*, 238 Ill. 534, 540-543.)

We believe that the two enactments referred to must be construed together, and so construed, the statutes provide that in the City of Chicago the Commissioner of Health, as such, is entitled to the fees, but he is bound under the law to pay all of said fees into the city treasury.

In view of the foregoing, we are further of the opinion that the Commissioner of Health has no power or authority to compromise his claim for fees and accept in full payment any sum less than the full amount due to the Commissioner of Health under the law.

We respectfully suggest, also, that any warrant drawn by the county clerk for the payment of fees for reporting deaths should be made payable to the Commissioner of Health of the City of Chicago and not to the individual person who occupies the office.

Respectfully submitted,

JOSEPH F. GROSSMAN,
Assistant Corporation Counsel.

Approved:

BRYAN Y. CRAIG,
Acting Corporation Counsel.

March 5, 1915.

In re APPLICATION OF EMMA GRIEBNOW, WIDOW OF CHARLES
L. GRIEBNOW, FOR POLICE PENSION.

To the Board of Trustees of the Police Pension Fund.

Gentlemen:

On July 16, 1914, your honorable body denied a pension to the applicant after an opinion rendered by this department dated May 6, 1914.

In the opinion referred to we advised your board that the right of Emma Griebnow to a widow's pension was so doubtful that we believed it advisable for the courts to pass upon this case.

Since then the applicant filed a petition for mandamus in the Circuit Court of Cook County, and on February 9, 1915, that court ordered the writ of mandamus to issue directing the board of trustees to grant Emma Griebnow a widow's pension.

The nature of this particular case is such that the chances of ultimately winning the case in the Supreme Court are slight. An adverse ruling by the Supreme Court would, however, do considerable damage to the pension fund, and we therefore recommend that the board of trustees obey the mandate of the Circuit Court in this case without setting any precedent for future cases similar in their nature.

Respectfully submitted,

JOSEPH F. GROSSMAN,

Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,

Corporation Counsel.

March 5, 1915.

In re DISCHARGE OF ASSISTANT CITY TREASURER.

HON. M. J. FLYNN, City Treasurer.

Dear Sir:

We have a communication from your department signed by Albert J. Keefe, dated February 16, 1915, requesting an opinion upon the civil service status of the assistant city treasurer of the City of Chicago, and especially upon the question

as to whether the City Treasurer has the right to discharge the assistant city treasurer without a trial by the Civil Service Commission.

Section 12 of an act entitled "An act to regulate the civil service of cities," approved and in force March 20, 1895, provides for the manner of removing all officers and employes within the classified civil service of the city upon written charges to be investigated by the Civil Service Commission. It is, however, provided therein as follows:

"Nothing in this section shall be construed to require such charges or investigations in cases of * * * persons having the custody of public moneys, for the safekeeping of which another person has given bonds."

The City Treasurer is elected by the people of the City of Chicago and under the statutes and ordinances is required to give bond for the faithful performance of the duties of his office and the payment of all moneys received by him.

By Section 22 of Article VII of the Cities and Villages Act, the City Treasurer is held responsible for the fidelity of all persons appointed by him.

The assistant city treasurer is undoubtedly a person having the custody of public moneys for the safekeeping of which the City Treasurer has given bond, and may, therefore, be discharged by the City Treasurer without charges or investigations by the Civil Service Commission.

Respectfully submitted,

JOSEPH F. GROSSMAN,

Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,

Corporation Counsel.

March 6, 1915.

In re APPLICATION OF ELIZABETH M. MURPHY, WIDOW OF ANDREW J. MURPHY, DECEASED PATROLMAN.

To the Board of Trustees of the Police Pension Fund.

Gentlemen:

On December 10, 1914, your board referred to the law department the application above named for an opinion as to the rights of the widow under the Police Pension Act.

Andrew J. Murphy, deceased patrolman, had served as a policeman a little over eight years when, according to the physician's report, he died of strychnine poison taken accidentally.

Under the law the widow is entitled to a pension only in case the death occurred while in the performance of police duty or from injuries received while in the performance of such police duties. (See Section 6 of the Police Pension Act.)

An investigation discloses that Andrew J. Murphy was badly injured on September 24, 1906, suffering a fracture of two ribs, the arm, and a compound fracture of both bones of the left leg. It is stated that at times the deceased suffered from periods of melancholia, but it is the opinion of Dr. Murray, who investigated this case for the board, that the death in this case was not due to the injuries.

In view of these facts the widow is not entitled to a pension under the law.

Respectfully submitted,

JOSEPH F. GROSSMAN,

Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,

Corporation Counsel.

March 6, 1915.

In re APPLICATION OF DANIEL J. DOWLING FOR RETIREMENT.
To the Board of Trustees of the Police Pension Fund.

Gentlemen:

On December 10, 1914, your honorable body referred to this department the application of Daniel J. Dowling for a policeman's pension.

Mr. Dowling has been a member of the department for over 21 years; about seven and one-half years of his service has been as a patrolman. Prior thereto, for more than 13 years, he was a driver and not classified or characterized as a policeman or a member of the police force of the City of Chicago.

Section 3 of the Police Pension Act provides:

"Whenever any person shall have been, or shall here-

after be appointed and sworn, or designated by law either as a probationary or regular policeman, and shall have served for a period of 20 years or more in the *police department* of such city * * * said board shall order and direct that such person after his service in such police department shall have ceased shall be paid a yearly pension," etc.

On May 9, 1913, in an opinion rendered to your board on the matter of petitions of police operators to contribute to the police pension fund, we held that the foregoing provision does not require a person to serve as a policeman for 20 years before he becomes entitled to be retired with a pension, but provides only that if at any time during his service in the department he is sworn in as a policeman and has served 20 years in the police department in any capacity he is entitled to a pension.

We therefore recommend that a pension be granted in this case.

Respectfully submitted,

JOSEPH F. GROSSMAN,
Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,
Corporation Counsel.

March 8, 1915.

In re DAMAGE TO BRIDGE OF VILLAGE OF EVERGREEN PARK BY
CITY'S AUTO TRUCK.

HON. JOHN A. RICHERT, Chairman, Committee on Finance.

Dear Sir:

Yours of the first *ultimo* requesting an investigation and opinion as to whether the City of Chicago was liable to the Village of Evergreen Park for damage done to its bridge by reason of an auto truck belonging to the City of Chicago crossing the same was received.

It appears that said bridge was built about four years ago; traffic crossing said bridge consisted of farm, lumber and material wagons weighing not over 10,000 pounds. This was the traffic when it was first constructed, which has since been the usual use of the bridge.

The driver of the auto truck had crossed a culvert with said truck loaded with water pipe, but changed the course because it was the last load and he considered the culvert at 75th street and Kedzie avenue unsafe, as it cracked every time he drove across it with a load of pipe. The weight of the load and truck was a little less than 20,000 pounds.

This bridge was constructed for the usual use of traffic in that vicinity, and said village was required to construct a bridge for such use only.

The said bridge was required to bear the weight of said truck, the property of the City of Chicago, which was not the usual use for which the bridge was constructed, and the use of the bridge by the City of Chicago otherwise than for which it was constructed subjects it to liability.

Very respectfully,

S. A. T. WATKINS,
Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,
Corporation Counsel.

March 10, 1915.

In re LIABILITY OF CITY FOR DAMAGE TO STREET CAR BY A
CITY GARBAGE WAGON.

HON. WALTER G. LEININGER, Superintendent of Streets.

Dear Sir:

Your letter of March the 2d, 1915, addressed to Mr. N. L. Piotrowski, City Attorney, has been referred to this office and assigned to me for reply, regarding the liability of the City of Chicago for damage to street car No. 966, belonging to the Chicago Surface Line, which was standing on east bound track of latter company in Blue Island avenue at Leavitt street, 10:30 a. m., November 17, 1914. It has been charged that a garbage wagon in the service of the city collided with said car, bending the grab handle and breaking the door jamb. Number of wagon and name of driver were not ascertained.

It is a well settled principle of law that a municipal corporation engaged in the performance of a public service in which it has no particular interest, or receives no special ben-

benefits in its corporate capacity, but which it is bound to see that it is performed in pursuance of a duty imposed by law for the general welfare of its inhabitants, and that persons employed in the performance of such duties, though employed by the corporation, act as public officers charged with a public duty. The doctrine of our courts seems to be that a municipal corporation is not responsible for the negligence of its agents in the performance of public duties.

In the following cases it has been held that a municipal corporation is not liable for injury occasioned by the negligence of persons employed:

Love v. City of Atlanta, 95 Ga. 129;

action for personal injuries. Garbage wagon collided with buggy, causing injury to plaintiff.

Haley v. Boston, 191 Mass. 291;

action to recover personal injuries through the negligence of the driver of a cart belonging to the city.

Condict v. Jersey City, 46 N. J. L. 157;

suit to recover damages for the death of plaintiff by negligence of driver in management of horse and cart owned by city.

Conway v. Nashville, 100 Tennessee 262:

“The city is not liable for negligence of the driver of a street sprinkling cart in colliding with and overturning a buggy, thereby injuring its occupant. The employee is, in such a case, engaged in the performance of a governmental, not of a mere ministerial duty.”

Cases in other jurisdictions might be referred to which hold that, when a municipal corporation is engaged in governmental duty of promoting the general health, it will not become liable for the negligence of those in the performance of that duty.

I am, therefore, of the opinion that the city is not legally liable for damage sustained as alleged.

Very respectfully,

EDWARD CLANCY,

Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,

Corporation Counsel.

March 11, 1915.

***In re* RIGHT OF GAS COMPANY TO REFUSE CONSUMER SERVICE
BECAUSE OF UNPAID BILLS FOR GAS USED AT ANOTHER
LOCATION.**

HON. MONTAGUE FERRY, Commissioner of Public Service.

Dear Sir:

We are in receipt of your communication of the 10th inst., requesting an opinion as to whether the gas company has the right to refuse to supply gas at one location on account of the non-payment of a gas bill incurred at another address by the same person applying for gas at a new location.

The general rule in respect to a public service company compelling payments of an amount due at other premises, or of independent claims, as a condition to furnishing a supply at a new location, is stated thus in *McQuillin on Municipal Corporations*, Section 1691:

“The general rule is that a patron cannot be refused a supply or service because of his unpaid bills at other premises, or his failure to pay past due rents for some other and independent use, or amounts due on a separate and distinct transaction from that for which he is claiming and demanding a supply.”

In the case of *Danaher v. Southwestern Telegraph & Telephone Co.*, 127 S. W. 963; 30 L. R. A. (N. S.) 1027, the Supreme Court of Arkansas, in March, 1910, held that a telephone company, being a public service corporation, could not refuse to serve one until he pays the company a debt contracted for services rendered in the past. A holding to the same effect is found in the case of *Southwestern Telegraph & Telephone Co. v. Luckett* (Tex. Civ. App.), 127 S. W. 826.

The courts of Illinois have not, so far as we are informed, passed upon the point in question. The decisions in other states are not uniform, although we believe that the weight of authority supports the text quoted from *McQuillin on Municipal Corporations*.

We are inclined to the opinion that the fact that a person has failed to pay a bill for gas incurred under a contract for one location does not warrant the gas company in refusing

to supply gas to the same person at another location. Public service companies may adopt and enforce a rule requiring security or a deposit of money to secure payment for a supply or service to be furnished. (See our opinion to you of September 8, 1914, *re* deposits required by the Peoples Gas Light and Coke Company to secure payment for gas to be consumed.)

If a person who is in default on a contract for gas at one location makes application for gas at another location and the company doubts such person's willingness or ability to pay for gas to be furnished at the new location, it may fully protect itself by requiring a deposit or security to secure the payment for gas to be furnished at the new location, and may, if it sees fit, resort to the courts for the collection of the unpaid bill for gas furnished at the former location.

Yours very truly,

BRYAN Y. CRAIG,

First Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,

Corporation Counsel.

March 11, 1915.

In re PROHIBITION OF SALE OF CIGARETTES.

HON. FRANCIS D. CONNERY, City Clerk.

Dear Sir:

Your letter of June 19, 1914, transmitting therewith a proposed ordinance under consideration by a sub-committee on license prohibiting sale of cigarettes, etc., received.

We have held several conferences from time to time on this matter and have carefully studied the court decisions of many states, both on our own investigation and from briefs submitted by the parties in interest, and respectfully submit the following as our opinion:

The case of *Gundling v. The City of Chicago* in the Illinois Supreme Court (176 Ill. 348), held that:

"The consensus of opinion in reference to the use of cigarettes is, that they are injurious to the young with immature minds, and common observation causes us to know that tobacco in the form of cigarettes is more largely

used by those of young and immature minds than by any other class."

The court did not undertake to decide in that case whether or not a city, by ordinance, could prohibit an adult citizen from using, selling or giving away cigarettes or cigarette papers.

In the later case of the *City of Zion v. Behrens*, the Illinois Supreme Court (262 Ill. 510) held void a city ordinance prohibiting the smoking of or having possession of any lighted cigar, cigarette, pipe, etc., in any street, public place or building within the city. In that case the court on page 511 says:

"Recognizing that tobacco smoke is offensive to many persons, and in exceptional cases harmful to some, we have no doubt that power exists to prohibit smoking in certain public places, such as street cars, theaters, and like places where large numbers of persons are crowded together in a small space. But this is quite a different matter from prohibiting smoking on the open streets and in parks of a city, where the conditions would counteract any harmful results. The personal liberty of the citizen cannot be interfered with unless the restraint is reasonably necessary to promote the public welfare."

And on page 513, in the same case, the court further says:

"In the broad language in which the ordinance is enacted it is apparently an attempt on the part of the municipality to regulate and control the habits and practices of the citizen without any reasonable basis for so doing. The ordinance is an unreasonable interference with the private rights of the citizen and must be held void."

We would respectfully call your attention that the city has now in force, Sections 728 to 739 of The Chicago Code of 1911, regulating the sale of cigarettes and prohibiting the sale of adulterated cigarettes, etc. (section 731), and prohibiting the sale of cigarettes to minors (section 732), and prohibiting the sale of same near schools (section 733), and providing for inspection by the Commissioner of Health of places where cigarettes are sold to see if city and state laws regulating sales of cigarettes are complied with (section 729).

We are of the opinion, therefore, that the parts of the proposed ordinance that could be sustained are practically all

now in force; and that the additional parts of such proposed ordinance would be held void by the courts.

A communication of about the same date in reference to "Smo-ko" was answered at once and a copy of the opinion of this department rendered to the superintendent of police was sent to Miss Lucy Page Gaston.

Yours very truly,

WILLIAM J. NAUGHTON,
Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,
Corporation Counsel.

MARCH 13, 1915.

In re STATUS OF 71ST STREET ABUTTING OAK WOODS CEM-
ETERY.

HON. EUGENE H. BLOCK, Chairman, Committee on Local
Transportation.

Dear Sir:

In answer to your inquiry of the 10th inst., as to whether or not 71st street alongside of Oak Woods Cemetery was of full width before said cemetery was established, I wish to say that the official maps of the city do not furnish any evidence of such fact.

Dobson's Atlas of Hyde Park of 1874 does show said street of a uniform width of 66 feet.

The charter of the Oak Woods Cemetery Association is embodied in the act of the General Assembly approved February 12, 1853.

Beyond the provision that the association shall acquire and hold not to exceed 160 acres of land for a cemetery near the City of Chicago, and that a plat of said cemetery shall be made and filed in the Recorder's office, I do not find any prohibition against the opening of a street such as here contemplated.

Seventy-first street is a section line and would today furnish a valuable thoroughfare for local transportation.

Under clause 79 of the powers of the City Council, power is conferred "to establish and regulate cemeteries within or

without the corporation and acquire lands therefor, by purchase or otherwise, and cause cemeteries to be removed, and prohibit their establishment within one mile of the corporation.

It is the fixed principle of the law that all corporations accept their franchises subject to regulation under the police power.

Concordia Cemetery Assn. v. Minnesota & Northwestern Railroad Company, 121 Ill. 199.

In this case the railroad company condemned part of the land of the cemetery association for right of way.

I am of the opinion that a survey of the ground should first be made in order that possible encroachment may be established against the Cemetery Association.

On the other hand, it is evident that having the power to cause the removal of the entire cemetery, the city may surely open said street to its full width if investigation discloses that the cemetery is justified in its present occupation.

Very truly yours,

NICHOLAS MICHELS,
Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,
Corporation Counsel.

MARCH 15, 1915.

In re WHAT CONSTITUTES A LUMBER YARD.

HON. EDWARD COHEN, City Collector.

Dear Sir:

We wish to acknowledge receipt of your communication of January 7, 1915, to this department; also the accompanying letter of the Edward Hines Lumber Company.

Said company has contended that it has only five lumber yards and remitted \$100 as a license fee to your office for the year of 1915, for each lumber yard, and also requested that you put an exact description of each lumber yard in the separate licenses.

An opinion is requested as to what constitutes a lumber

yard and, also, as to how you shall determine the number of licenses according to the descriptions given.

We have made an investigation from this office and find that the following circumstances exist as to each yard:

The company's yard at the south fork of the Chicago River extends north to a railroad track; also we find that a branch of the river extends north called "D Slip" west of Lincoln street. That "C Slip" also extends north between Wood and Lincoln; that on either side of the slips and of Lincoln street comprises the lumber yard. The yard on Lake street is bounded by La Vergne avenue and Laramie street and on the north by the C. & N. W. Railroad Company. The West 12th street yard has about 400 feet frontage along 12th street on the north side thereof and is compact without any intersecting street. The Milwaukee avenue yard is located on both sides of Milwaukee avenue west of Kenton avenue, with one office. The Balmoral avenue yard runs north of Balmoral avenue and east of Lincoln street, and has a branch further north on Lincoln street on the west side of same but opposite no part of the other part of the yard, and, of course, divided by Lincoln street. The office for these two yards is at Balmoral and Lincoln streets.

The issuance of a license for lumber yards is controlled by section 1585 of The Chicago Code of 1911, which is as follows:

"LICENSE—APPLICATION—FEE.) No person or corporation shall keep, carry on, conduct or maintain a lumber yard, or other place where lumber is sold from yard, car, vessel or place, or where lumber is stored for the purpose of seasoning or drying the same, or where second-hand lumber is stored or kept for sale, without first having obtained a license therefor as hereinafter provided. Any person or corporation desiring to keep, conduct or maintain a lumber yard or place for the selling, storing or keeping of lumber as described hereinbefore, shall make application in writing to the Mayor for a license so to do, setting forth therein the name of the applicant and the place where it is desired to keep such lumber yard or place for the storage or sale of lumber, and thereupon upon payment by such applicant to the city collector of a license fee at the rate of \$100 per annum, the Mayor shall issue or cause to be issued a license

to such applicant, attested by the city clerk, authorizing the applicant to keep, conduct or maintain a lumber yard or place for the storage or sale of lumber at the place designated in such application. If such applicant shall desire or intend to keep or conduct more than one lumber yard or place for the storage of lumber, a license shall be secured for each such lumber yard or place, and a full license fee as herein fixed shall be charged for each such license so issued."

We find no adjudicated cases in our Illinois courts of appeal interpreting what a "yard" is, and upon consulting the decisions in other states we find no decisions interpreting the term "yard" in the sense or circumstances under which the matter is now under consideration.

The root of the word "yard" is derived from the word "gird," meaning "an enclosure," according to the Standard Dictionary, and hence is defined by that dictionary as: 1. "A piece of enclosed ground of small or moderate size; particularly a piece of ground enclosing or adjoining a house or other building or enclosed by it; as a front yard, * * * a barn yard. 2. An enclosure within which any work or business is carried on; as a brick yard, a wood yard, etc."

In the case of *Wright v. Sample*, 162 Ala. 222, the court adopted the definition of a yard from Webster's Dictionary as meaning by common acceptance "an enclosure."

In the case of *Patterson and R. R. Co. v. the City of Patterson*, 70 N. J. Law 112, adopted the following definition of a freight yard:

"A place where there were side tracks and where cars were unloaded and trains made up, and which was used as a storing yard, and the tracks in such mode of use had been continued for 23 years, was a freight yard, across which the city had no power to lay out a street."

We do find, however, in the Illinois case, *C. B. & Q. R. R. Co. v. Hans*, 111 Ill. 114, language which conveys the idea that side tracks and freight yards must be enclosed under a statute compelling railroad companies to fence their right of ways except at crossings of public roads.

The above quoted section 1585 of The Chicago Code of 1911 must also be interpreted in conjunction with section 664

of The Chicago Code of 1911, as amended, which section controls the issuance of licenses to lumber yards when the same are in residential districts, and which is in part as follows:

“Any premises fronting on any street in any block where two-thirds of the buildings on any street surrounding any such block are used exclusively for residence purposes, unless the written consent of the owners of a majority of the frontage on both sides of all streets surrounding the block in which it is proposed to locate, establish, conduct or maintain such lumber yard or place, be first obtained. * * *”

In view of the foregoing, we are of the opinion that a lumber yard must be located on one compact body of land and cannot be larger in extent than the block on which it is located. If lumber yards are separated by a public street or streets they must be considered as separate and distinct lumber yards, and a separate license obtained for each of such yards.

Accordingly, we are of the opinion that the Wood street yards comprise two lumber yards, as also the Milwaukee avenue yards, and the North Lincoln street yards, one yard on West 12th street and one yard on West Lake street, making a total of eight lumber yards for said Hines Lumber Company.

Yours truly,

M. W. CAGNEY,

Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,

Corporation Counsel.

MARCH 16, 1915.

In re METHOD OF PAYING SALARIES OF CITY EMPLOYEES.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

You state in your letter of recent date that numerous complaints have been made to you regarding the new method of paying salaries to city officials and employes, and ask for an opinion as to the legality of this method.

The plan adopted by the City Comptroller is to ascertain the salary per day by dividing the amount of the annual sal-

ary by the number of days in the year, and then to make payments on fixed days twice each month for the exact number of days which intervene between pay days on the basis of the amount of salary earned per day.

This method seems to have been adopted without council action of any kind. Some time ago salaries were paid monthly, one-twelfth of the annual appropriation for same being paid on a certain day of the month without regard to the variation of the number of days in the month. Later on, when semi-monthly payments of salaries were decided on, the same plan was followed, each payment being for one-twenty-fourth of the annual salary. This was changed in the latter part of the year 1914, when the present system was inaugurated by the Comptroller.

The precise question presented, therefore, is whether the Comptroller, when he changed from the semi-monthly payments, which were clearly within the meaning of the ordinance, to the present method, was justified in making payments at the rate per day instead of the semi-monthly rate.

The Chicago Code of 1911 provides that salaries shall be fixed by the City Council in the annual appropriation bill, and after that provision comes Section 1647, which reads as follows:

“The salaries and pay of all officers and employes shall be due and payable monthly or semi-monthly to each person entitled thereto, in the manner prescribed by the rules and regulations of the department of finance.”

There is nothing in the statutes which has any bearing on the question, and consequently its determination depends on the proper interpretation of the above section of the ordinance, which we believe should be construed to mean that the semi-monthly payments include a half month's salary rather than an indeterminate number of days, depending on the interval between pay days.

The rule is that where the payments on a contract are to be monthly, no account is taken of the number of days in a month.

The word “month” is always construed to mean a calendar month when used in statutes or ordinances unless

there is something in same which indicates that a contrary meaning was intended.

Simmons v. Hanne, 50 Fla. 267.

Kimball v. Lamson, 2 Vt. 138.

Minard v. Burtis, 83 Wis. 267.

Bohles v. Prudential Ins. Co., 83 N. J. Law 246.

Fairchild v. So. Ref. Co., 158 Cal. 264.

Foster v. State, 149 Ala. 632.

Ryer v. Prudential Ins. Co., 185 N. Y. 6.

Arguing from analogy, the word "semi-monthly" must be understood to be one-half of a calendar month.

As far back as 1851 it was held, in the case of *White v. Atkins*, 62 Mass. 367, that where a person agrees to work for another for a year for a certain sum, payable monthly, the former may at any time during the year demand payment of the wages due him for the entire month or months then elapsed.

The words "in monthly payments as due" were construed to warrant the bringing of a suit for compensation after the expiration of two months on an advertising contract which provided for payment of a fixed amount for a period of a year, in *McKillop v. N. Y. Preparatory School*, 91 N. Y. Suppl. 338.

In cases of wrongful discharge, if the hiring is for a year, payable in monthly instalments, the employe may recover for an instalment after the expiration of the month.

The following authorities sustain this view :

14 Am. & Eng. Ency. of Law 797.

Blum v. Holitzer, 53 Ga. 82.

Williams v. Luckett, 77 Miss. 394.

James v. Parsons, 70 Ken. 156.

A hiring for a year, payable in monthly instalments, must therefore be regarded as a contract in which the compensation is due in 12 equal instalments. The ordinance, therefore, in case it provided only for monthly payments, would unquestionably mean that the payments were to be in equal instalments.

Such being the case, it follows naturally that where an

ordinance specifies that salaries shall be due and payable monthly or semi-monthly, the payments contemplated are for the calendar periods named, that is to say, 12 or 24 equal instalments, as the case may be, and not for an indeterminate number of days, dependent on the length of the month.

We have forwarded a copy of the above opinion to the City Comptroller and the City Treasurer.

Yours respectfully,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,

Corporation Counsel.

MARCH 18, 1915.

In re OBLIGATIONS OF CHICAGO MUNICIPAL TUBERCULOSIS SANITARIUM TO TAKE PATIENTS AND MEANING OF WORD "RESIDENT."

City of Chicago Municipal Tuberculosis Sanitarium, 1511 Fort Dearborn Building, Chicago, Ill. *Attention of Mr. Coon.*

Gentlemen:

Your letter of the 22d inst., addressed to the undersigned, requesting an opinion as to the meaning of the statute with regard to the word "resident" as contained in section 691, Chapter 24, Hurd's Revised Statutes of Illinois 1912, relating to public tuberculosis sanitariums established under said section, has been received.

Said chapter provides in part as follows:

"Every sanitarium established under this act shall be free for the benefit of the inhabitants of such city or village."

The courts in defining "inhabitant" have held:

"In general terms one may be designated as an 'inhabitant' of that place which constitutes the principal seat of his residence, of his business, pursuits, connections, attachments, and of his political and municipal relations. *Phillips v. City of Boston*, 67 N. E. 250, 251; 183 Mass. 314 (quoting and adopting definition in *Lyman v. Fiske*, 17 Pick. (34 Mass.) 231, 234; 28 Am. Dec. 293)."

They have also held:

“The word ‘inhabitant’ is ordinarily used to indicate a person with a fixed domicile or legal residence, and an ‘inhabitant’ therefore is one who has an established residence at a given place. *Bechtel v. Bechtel*, 112 N. W. 883, 884; 101 Minn. 511; 12 L. R. A. (N. S.) 1100.”

The courts have further held that the words “resident” and “inhabitant” mean the same thing.

Pearson v. West, 77 S. W. 944, 945; 97 Tex. 238.

Helle v. Deerfield Tp., 96 Ill. App. 642, 643.

Stevens v. Farwill, 84 S. W. 113; 118-110 Mo. App. 140.

In your letter you ask for an opinion:

“1st. How long a residence in the city should be required in order to entitle a person to the benefits of the institution? For instance, if a person living outside of Chicago, suffering with tuberculosis, should remove to the city for the sole purpose, perhaps, of obtaining the advantages which the institution offers, would he be considered a resident of the city under those circumstances after remaining but a few days or weeks?”

With reference to the above question, will say that it is indeed difficult to determine just how long a residence should be required in order to entitle a person to the benefits of the institution. No special rule as to the time required for residence can be laid down. It is incumbent upon the board of directors of your institution to weigh the facts in each case and to determine from said facts whether or not the patient comes within the provisions of the statute and definition of “inhabitant” as our courts have defined it.

Our courts have further held:

“A temporary sojourn within a state for pleasure or business accompanied by the intention of returning to the state of former inhabitation does not constitute residence—*In re Mulford*, 217 Ill. 242, citing *Pelle v. Snell*, 130 Ill. 379.”

Also:

“If the departure from one’s fixed and settled abode is for a purpose in its nature temporary, whether it be for business or pleasure, accompanied with an intent of returning and assuming the former place of abode as soon

as such purpose is accomplished, in general such a person continues to be an inhabitant of such a place of abode for all purposes of enjoying civil and political privileges and of being subject to civil duties. * * *
Sears v. City of Boston, 42 Mass. (1 Mete.) 250, 251."

I would not consider a person a resident or an inhabitant of this city who came here for the sole purpose of taking treatments at your institution, with the intention of returning to his former residence after the treatment had been effected, and therefore would not consider him entitled to the privileges of the institution which are extended to "inhabitants" of the city.

In answer to your second question, namely:

"2d. Does absence from the city for the express purpose of a change of climate or other means of treatment for tuberculosis covering a period of several months (or it may be two or three years) deprive a person of his right to treatment as a resident of the City of Chicago?"

In my opinion the courts would hold that the temporary absence of a person from the city for the purpose of a change of climate or other means of treatment for tuberculosis covering a period of several months (or maybe two or three years) does not deprive a person of his right of treatment as a resident of the City of Chicago. This being under the theory that a persons's legal residence is not changed when he leaves it for temporary purposes and transient objects and means to return when those purposes are accomplished and objects attained.

See

Daubman v. City Council of City of Camden, 39 N. J. Law (10 Broom. 57-59).

Hislop v. Taaffe, 125 N. Y. Supp. 614, 615; 141 App. Div. 40.

Respectfully submitted,

LOUIS SALINGER,
Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,
Corporation Counsel.

MARCH 18, 1915.

In re REVOCATION OF PERMIT FOR OPERATION OF JUNK SHOP
WITHIN 400 FEET OF A CHURCH.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

You transmitted to us letter of Alderman Frank Klaus, addressed to you, asking for the revocation of a junk shop license issued to Abraham Silverman to conduct a junk shop at 1611 Blue Island avenue on the ground that the junk shop is within 400 feet of a church, and desire an opinion in this matter.

The ordinance which Alderman Klaus contends is being violated in section 2267 of The Chicago Code of 1911 as amended on June 3, 1912, and appearing in the Journal of the Proceedings of the City Council, page 616. Under said ordinance it is unlawful for any person, firm or corporation

“to locate, establish, conduct or maintain any junk shop or junk yard within four hundred (400) feet of a church * * *.”

If the junk shop is within 400 feet of a church, then it is being operated in violation of section 2267 of The Chicago Code of 1911, as amended, and if a license has been granted to this junk shop it has been granted in violation of the ordinances of the city and you have the power to revoke said license.

Yours truly,

MAX M. KORSHAK,

Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,

Corporation Counsel.

MARCH 19, 1915.

In re CITIZENSHIP OF APPLICANTS FOR CIVIL SERVICE.
TO THE CIVIL SERVICE COMMISSION OF THE CITY OF CHICAGO.

Gentlemen:

We have your communication of March 15, 1915, in which you ask us to interpret section 6 of the Act Regulating Civil Service of Cities relating to applications for examinations and

whether the applicant must be a citizen of the United States at the time of the filing of his application, or if it is sufficient for an applicant to produce proof of his naturalization at the time of taking the examination.

Section 6 of the Act to Regulate Civil Service of Cities provides that all applicants for offices or places in the classified service shall be subjected to examination which shall be public, competitive and free to all citizens of the United States with specified limitations as to residence, age, health, habits and moral character. The section referred to contemplates that every citizen of the United States shall have an opportunity to take the examination, but section 4 of the same act directs the Commission to make rules to carry out the purposes of the act.

The Civil Service Commission, by its rules, has provided for the filing of applications for examinations at a stated period prior to the examination so as to permit the Civil Service Commission to determine whether the applicant is qualified to take the examination. Such a rule is reasonable, and yet if section 6 of the Civil Service Act were strictly construed the Commission would be obliged to permit any person to take the examination if he applied at any time before the examination was being held. There is no reason why the Civil Service Commission may not require proof of citizenship at some time prior to the taking of the examination as well as proof of other qualifications disclosed by the application.

We are of the opinion, therefore, that the ruling of the Civil Service Commission to the effect that the applicant for examination should be a naturalized citizen of the United States at the time his application is filed, if the application is required to be filed within a reasonable time before the examination, is warranted by the law.

Respectfully submitted,

JOSEPH F. GROSSMAN,
Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,
Corporation Counsel.

MARCH 20, 1915.

In re CLOSING OF SHOPS ON SUNDAY.

HON. OTTO KERNER,

Alderman 12th Ward, Chicago, Illinois.

Dear Sir:

You have requested an opinion as to whether an ordinance providing for the closing of butcher shops, bakeries and places of other food dealers on Sundays would be legal. In answer to the above inquiry, we respectfully refer you to decisions of the Supreme Court, which we mention below. They contain a full review of the questions involved in the exercise of the police power of the city in this respect.

The first of these cases is *McPherson v. Village of Chebanse*, 114 Ill. 46. In that case, it was held that under its general police powers the village had a right to pass an ordinance prohibiting the keeping open of places of business on Sunday for the sale of goods, etc. The particular language used by the court, which you may find pertinent to the question at issue is as follows:

“Subdivision 66, of section 62, article 5, of the ‘Act to provide for the incorporation of cities and villages’ (Rev. Stat. 1874, p. 221), gives the power ‘to regulate the police of the city or village, and pass and enforce all necessary police ordinances.’ Under this grant of power, we are of opinion, there is found authority for the passage of the ordinance.

“It is insisted this clause only refers to the organization and regulation of a police force. We think this a too narrow construction—that the clause is not limited in its application to police officers, but may extend to and embrace a subject matter of police regulation, under the general police power of the state. Unintermittent toil of body or mind is not the best condition of either. They have need of relaxation and periods of rest from labor, in order for their healthfulness and greatest working efficiency. From the antiquity and general extent of the practice of setting apart one day in seven as a day of rest, that would seem to be denoted as a suitable, if not the necessary requirement of the human economy as to the portion of time which should be given to rest from labor. Thus, with the Jews, under the Mosaic Code, we find one day in seven (the Sabbath) dedicated to an entire cessation from ordinary labor. Afterward we have

the Lord's day. In A. D. 321, Constantine, by edict, ordered the suspension on Sunday of all business in the courts of law, except the manumission of slaves, and all other business except agricultural labor. In Great Britain, from early times, Sunday was set apart as not to be employed in secular labor. With respect to the transaction of judicial business, there came the legal maxim, *dies dominicus non est juridicus*. In the 29th of Charles II (A. D. 1678), after there having been passed several previous statutes prohibiting certain acts and business on Sunday, the statute was passed prohibiting the doing of any worldly labor, business or work of one's ordinary calling upon the Lord's day, works of necessity and charity excepted. In this country, statutes of a similar character, prohibiting labor on Sunday to a more or less extent, exist in most, if not all, the states of the Union. Aside from the religious aspect, the appointment of the Sabbath merely as a day of rest from labor, stands recommended as a valuable institution of State policy."

In case this power is exercised, however, it must be so done that no discrimination will result therefrom. It was so held in the other case that we speak of.

In *Eden v. The People*, 161 Ill. 296, the court held that the closing of barber shops on Sunday deprives a barber of property without due process of law and that the same is class legislation.

It will be observed that this case does not actually reverse the Village of Chebanse decision, but it indicates that if a law of that character is passed, it must operate on all persons of a class alike. The concluding paragraph of the case will show the attitude of the court in this respect. It reads as follows:

"We do not, therefore, think the law was authorized by the police power of the State. If the public welfare of the State demands that all business and all labor of every description, except works of necessity and charity, should cease on Sunday, the first day of the week, and that day should be kept as a day of rest, the legislature has the power to enact a law requiring all persons to refrain from their ordinary callings on that day. (Cooley's Const. Lim. 725.) All will then be placed on a perfect equality, and no one can complain of an unjust discrimination. But when the legislature undertakes to single out one class of labor harmless in itself, and con-

demn that and that alone, it transcends its legitimate powers, and its action cannot be sustained."

Our conclusion, therefore, is that an ordinance closing stores such as butcher shops, bakeries and other food supply places on Sundays would be of doubtful validity, because it singles out occupations which in all respects are similar to other stores and businesses that would be permitted to be open Sundays. It could not be justified on the grounds that food supplies were in a different category from other merchandise.

Hence, if there is to be an ordinance closing that kind of stores, it would have to be as broad as is indicated by the Supreme Court in the Eden decision, that is to say, it would have to include the cessation of all labor except that of necessity and charity. We believe anything short of that would probably be unconstitutional as constituting a discrimination.

Yours respectfully,

LEON HORNSTEIN,
Assistant Corporation Counsel.

MARCH 20, 1915.

In re MAINTENANCE OF JUNK SHOPS WITHIN 400 FEET OF A
CHURCH.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

Mr. Fitzmorris, your secretary, handed us letter of Joseph Silverman, dated March 8, 1915, relative to the matter of the revocation of the junk shop license of Abraham Silverman, 1611 Blue Island avenue, and desires to have us inform you whether the information contained in this letter will affect our opinion written on this subject dated March 18, 1915.

The particular portion of the letter to which Mr. Fitzmorris calls our attention is the third clause of the communication:

"Third: The premises 1611 Blue Island avenue, were used for a junk shop or for junk purposes for the past 25 years and are especially outfitted for this business only. Even if they were remodeled (which would cost at the least \$2,000.00) they could not be rented because the neighborhood is a poor one. From 1600 to about 1650 Blue Island Ave. there is a feed store, harness

shop, saloon, grocery, and barber shop who can say they are making a living because they are on Blue Island Ave., the balance depend on the business they secure by soliciting throughout the city. As a further proof there are at present four stores empty directly across the street and another will be vacant after May 1st and the prospects for renting them are mighty poor.”

The only information contained in this paragraph which might in any possible way be material from a legal standpoint is, the information that the premises in question were used for a junk shop or for junk purposes for the past twenty-five years.

You will note that section 2267 of The Chicago Code of 1911 as amended on June 3, 1912 (Journal of the Proceedings of the City Council, p. 616), makes it unlawful for any person, firm or corporation “to locate, establish, conduct or maintain any junk shop or junk yard within four hundred (400) feet of a church * * *.”

The question arises as to whether the language of the ordinance is broad enough to include a junk shop which had been established prior to the passage of the ordinance and was within four hundred (400) feet of a church.

In *People v. Village of Oak Park*, 266 Ill. 365, the Supreme Court construed an ordinance which made it unlawful to “build, construct or maintain” a public garage in a residence district without obtaining certain frontage consents. The court in this case, said, at page 371:

“Neither do we think the ordinance void because it discriminates in favor of those persons engaged in a like business at the time the ordinance became effective, December 19, 1912. The ordinance clearly states ‘it shall not be lawful for any person or corporation to locate, build, construct or maintain.’ This, in our opinion, as clearly applies to public garages then in operation as to those to be subsequently opened. Any failure of the city authorities of Oak Park to enforce the terms of the ordinance does not render the ordinance void.”

In the above case, there was no attempt to interfere with a garage which had been established long before the ordinance became effective. While the matter is not entirely free from doubt, we believe that the courts would hold the above

decision applicable to the present situation and that the language of the ordinance is broad enough to apply to an existing junk shop regardless of when such junk shop has been established.

We have been informed that the premises in question ceased to be operated as a junk shop for a period of six months or more during the year 1914. This fact would probably operate in favor of the city, since the city could show that the premises were not operated continuously as a junk shop, during the past twenty-five years.

While the matter is not entirely free from all doubt, we believe that your action in revoking the license would, in all probabilities, be sustained by the courts should the matter be tested out in litigation.

Very truly yours,

MAX M. KORSHAK,
Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,
Corporation Counsel.

MARCH 23, 1915.

In re NEIGHBORHOOD EXCHANGE TELEPHONE SERVICE IN ANNEXED TERRITORY.

HON. M. FERRY,

Commissioner of Public Service.

Dear Sir:

We are in receipt of your communication of the 22d instant, requesting an opinion in regard to whether a subscriber of the Chicago Telephone Company residing in territory which was recently annexed to the City of Chicago is entitled to neighborhood exchange service by reason of the fact that he resides within one mile of the original center of the Rogers Park neighborhood exchange.

The Chicago Telephone Company's ordinances of November 6, 1907, and May 26, 1913, relate to telephone service within the City of Chicago. Subdivision (h) of section 2 of the ordinance of May 26, 1913, in regard to neighborhood exchange service, which is substantially a re-enactment of sub-

division (e) of section 6 of the ordinance of November 6, 1907, contemplates and provides for neighborhood exchange service within the limits of the City of Chicago.

It provides that the telephone company may maintain and establish local and neighborhood exchanges within the city limits and that the company shall not abolish any local or neighborhood exchange established or maintained by it at the time of the passage of said ordinance without the consent of the City Council and that the company shall establish and maintain a local or neighborhood exchange in specified suburban districts within the city limits whenever the City Council shall so direct, etc.

The City Council would have no power to legislate in regard to telephone rates for territory outside of the city limits, and it is manifest that the boundaries of the neighborhood service exchanges could not properly be extended beyond the city limits. If a neighborhood exchange should be described as covering the territory within a given distance of a certain point and such distance should extend beyond the city limits in a certain direction, such description would have to be interpreted as meaning the territory within the prescribed distance from the central point and within the city limits of the City of Chicago.

It appears from your communication that the Rogers Park neighborhood exchange as actually maintained by the company stopped at the former city limits, that is, Howard avenue. We understand that maps are on file in the office of the city clerk, showing definitely the boundaries of the various neighborhood exchanges, and from what you say in your communication we have no doubt that the boundaries of this exchange as shown on said maps stop at Howard avenue.

We are of the opinion that the annexation of the territory in question to the City of Chicago did not operate to extend the boundaries of the Rogers Park neighborhood exchange as established and maintained prior to the annexation, and that

a subscriber residing in the annexed territory is not entitled to the Rogers Park neighborhood exchange service.

Yours truly,

BRYAN Y. CRAIG,

First Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,

Corporation Counsel.

MARCH 25, 1915.

In re LICENSES AND ADVERTISING OF UNDERTAKERS.

HON. G. B. YOUNG, M. D.,

Commissioner of Health.

Dear Sir:

We acknowledge receipt of your communication of December 17, 1914. You request an opinion upon the interpretation relative to the issuance of the annual licenses of and the regulation of undertakers under various clauses of The Chicago Code of 1911 as amended.

Your communication sets out ten specific propositions which we consider in their order as follows:

“1st. Four corporations are engaged in the undertaking business in Chicago, one of which is operating nine stores, each store carrying a license issued to an employee of the corporation, to whom all permits are issued. The corporation, however, advertises signs in stores, cards, stationery, daily papers and in city and telephone directories. Bills are also rendered in the name of the corporation. They claim that being incorporated under the laws of Illinois for the purpose of employing undertakers to engage in the business of undertaking, they have the legal right to advertise and to maintain stores, so long as licensed men actually do the work of embalming and preparing dead bodies for burial.”

In answer to this specification, we wish to state that while the letter of the ordinance specifies and contemplates the issuance of a license only to a person, still, under our interpretation of it, a person may conduct an undertaking establishment as the agent or officer of a corporation.

Under the corporation act the business of undertaking may be carried on by corporations. When the corporation is

formed for the purpose of carrying on a lawful business, as this undoubtedly is, it stands in the same position as a natural person.

Ordinances which restrict persons in the conduct of a lawful business are in derogation of common law and must be strictly construed. Consequently, if a corporation has an officer who qualifies as an embalmer and undertaker, he must have the right to take out a license in his own name and carry on his business in such manner as he sees fit, through the medium of a corporation or otherwise.

We believe that conducting an undertaking establishment through the means of a corporation is a development along business lines, and is calculated to bring about as faithful a compliance with all health regulations as would the conduct of the same business by an individual or firm. The services rendered by these undertaking corporations are practically in compliance with the provisions of the ordinance. The corporations conduct morgues as prescribed in the ordinances. They manage and conduct funerals and undertaking rooms the same as is done by an individual. Each corporation, either through an officer or employe, has a competent embalmer performing the duties prescribed by the ordinance.

Therefore, we are of the opinion that while the strict letter of the ordinance makes no provision for a license for a corporation, a reasonable construction of the same must lead to the conclusion that such business may be conducted by a corporation if a duly licensed embalmer is in charge of same.

The second specification is as follows:

“2d. There are 103 advertisements appearing in the Chicago telephone directory which are either at variance with the license issued for the place or in which no license has been obtained for either man or place.”

As to this proposition, we find from the detailed information furnished us from your office that the license issues to an individual in many cases and that the undertaking and embalming business is carried on under a firm name. As an illustration we specify as follows, from the group:

“Name advertised, James Bradley & Sons. License issued to C. P. Bradley.” This also constitutes what is known

as a development in business and is more frequently done in order to retain the old firm name and to control the good will of the business. Our courts recognize that a business may be conducted by an individual under a previous firm name for which the remaining partner frequently pays a high consideration in order to retain the good will of the former business. We see no objection to this, since there is no specific provision of the ordinance which prohibits the use of a business or trade name, the only prohibition being against a person holding himself out as an undertaker when he is not licensed.

As to another group specified in the list of 103 names submitted, there is a different set of circumstances. In illustration, we specify from the list, Kowalle and Coakley, who advertise as undertakers at 3156 Wallace street, but have no license, and there are other advertisers who announce themselves as undertakers at a certain place, but at the place advertised, only conduct a livery. In such cases as the above, no license at all is secured. There is still another group who advertise themselves as undertakers, but secure no licenses, and who advertise their residences as their places of business.

As to the groups last mentioned, we are of the opinion, that they are violating section 1236 of The Chicago Code of 1911, which is as follows:

“UNDERTAKERS TO BE LICENSED.) It shall be unlawful for any person to act as an undertaker, or to prepare a dead body for burial or cremation, or to manage a funeral, or to conduct, manage or be in charge of an undertaking room, store or place, or in any way advertise or hold himself out to the public as an undertaker by card, sign, solicitation or otherwise, without first obtaining a license as an undertaker or funeral director, as hereinafter provided.”

The third specification is as follows:

“3d. The names of thirty former undertakers who are dead, some of whom have been dead for over five years, are still being carried in the Chicago telephone directory.”

We believe that the persons advertising or responsible for the advertising of the thirty undertakers who are dead, are also violating the above quoted section 1236. This amounts

to holding one's self out as an undertaker under an assumed name, and every objection that could be urged against persons pretending they are licensed undertakers when they are not applies with equal force to a case of this kind.

The fourth specification is as follows:

"4th. Undertakers who are doing business under company names such as Brown & Son, Jones & Co., or Clark & Smith, when the undertakers' ordinance was first passed, were licensed as such and these licenses have been renewed from year to year. There are sixty-three of them."

We are of the opinion that the issuance of this class of licenses is irregular and improper. It is the intent of the ordinance that only competent undertakers should be licensed, and the fact that such a firm as Brown & Son, etc., was conducting an undertaking establishment before the ordinance went into effect does not necessarily indicate that there is a licensed embalmer and undertaker in charge. Some one must annually apply and may receive a license in his own name and may then conduct business under the firm name, but he cannot go ahead doing the business on the theory that the firm as an entity is entitled to the license. As to this we recommend that the practice of issuing licenses to this group be discontinued.

In reference to the fifth specification which is as follows:

"5th. There are forty-six undertakers who hold city undertakers' licenses, but who are not licensed as state embalmers. They are all men who were in business when the undertakers' ordinance went into effect. When the Chicago undertakers' ordinance was first passed, no state embalmers' license was required."

We are of the opinion that the forty-six undertakers who are not licensed as state embalmers under the Illinois statute, but who have secured undertakers' licenses under section 1237 of The Chicago Code of 1911, as amended, are not entitled to such undertakers' licenses, and even though the licenses were issued to them, they are conducting their businesses in violation of the ordinances and should be compelled to cease their operations by means of revocation of such licenses unless they can within such reasonable time as you may fix, qualify as licensed embalmers under the state law.

In reference to the sixth specification, which is as follows:

“6th. There is a question also as to the *renewal* of undertaking license in a store which does not meet the morgue requirements of section 1239. Licenses were first granted for these places simply upon application; ordinance at that time contained no morgue requirements. Licenses in these cases have been renewed year after year.”

We are of the opinion that you are authorized to withhold the issuance of a license to any undertaker whose establishment is not in compliance with section 1239 of The Chicago Code of 1911. That requirement is intended as a health regulation for all cases, and no rights inhere to any person by reason of having formerly conducted a place of this kind which does not meet the requirements of the ordinance.

As to the seventh specification, which is as follows:

“7th. What constitutes a violation of that portion of section 1236 which prohibits anyone from advertising himself as an undertaker ‘by card, sign, solicitation or otherwise, without first obtaining a license?’ Would the fact that a sign was placed upon a telegraph pole be considered a violation, or would it be necessary for it to be on a store, room or place where the work could actually be done, or would some overt act be necessary, in addition to the posting or displaying of such sign or advertisement, before it could literally be construed as a violation of the ordinances?”

We are of the opinion that the fact that a sign is placed upon a telegraph pole, etc., advertising an undertaking establishment which is not conducted or authorized according to law, constitutes a violation of section 1236, relative to advertising. The mere appearance of the sign is not sufficient proof in itself of a violation, for the reason that it must appear that the illegal advertising was intended for the purpose of holding himself out to the public as an undertaker and that the person or persons violating are responsible for the advertising. Inasmuch as proof must be exact, or nearly so, the person or his authorized agent actually posting the sign must be detected or an admission from the principal that it is his or its sign and that he authorized the same, must be secured. If the sign is on a store, room or place, certain pre-

sumptions will naturally arise, but when the sign is away from a person's premises, as on a telegraph pole, the violation is not presumed until the placing of the sign is connected up with the person responsible therefor.

Relative to the eighth specification, which is as follows:

"8th. Should an applicant for renewal be required to furnish the same qualifications, and place of business be provided with an approved morgue, the same as in the first or original application for a license? Would such requirement be, in effect, retroactive and illegal?"

You are authorized, under the ordinance, to require the same proof as to qualifications and of the requirements of the place of business upon an application for a renewal of the annual license if you have any doubt as to any change in the qualifications or identity of the applicant or any change or lack of requirements of the designated morgue, and persons called upon to furnish such proof must furnish it in the same manner as in the first or original application for license. The same is true with regard to persons who have formerly secured licenses without bringing their places of business into conformity with the ordinance. It is clearly intended that all undertaking establishment shall meet the physical requirements specified in the ordinance. Such a provision is not illegal even if in a certain sense retroactive.

In reference to the ninth specification, which is as follows:

"9th. Would an unlicensed employee who sleeps in an undertaking establishment and takes telephone calls or orders, be considered as violating the ordinances, unless he answered the calls and actually prepared the dead for burial?"

An unlicensed employee who sleeps in an undertaking establishment and takes telephone calls or orders, or otherwise acts as an agent of a person or corporation but does nothing in the nature of embalming or actually touching a dead body unless under the strict and personal supervision of an authorized undertaker or embalmer, would not in our opinion be violating The Chicago Code of 1911, as amended. Inasmuch as all ordinances must be reasonable and, therefore, their interpretation must also be reasonable, the fact that the person would receive a telephone call or attend to orders or

do office work in and about an undertaking establishment, would not be contrary to the ordinance. Should the authorized undertaker or embalmer step out of the premises, then such agent, under the strict letter of the ordinance, would "conduct, manage or be in charge of the undertaking rooms * * *'' without a license, but such a strained construction is unreasonable. We believe that such a strict interpretation would not only be harsh and unreasonable, but would lead to an absurdity if carried to an extreme, and we are therefore of the opinion that such acts can be performed by ordinary assistants.

The tenth specification is as follows:

"10th. What are the rights and limitations of a state licensed embalmer as affected by the city ordinances? Has he the legal right to be in charge of an undertaking establishment? Can he conduct funerals for a licensed undertaker?"

We are of the opinion that a person having a state embalmers' license has no right to be in active charge of an undertaking establishment, nor can he conduct funerals for a licensed undertaker. By performing these acts he would be an undertakers' assistant, and sections 1242-43 of The Chicago Code of 1911, require that such assistants shall receive a certificate so to act, upon payment of a fee and furnishing evidence of his qualifications so to act as specified in section 1242. The state license undoubtedly gives the licensee the right to embalm dead bodies without obtaining any other license. But it does not give the right to conduct a funeral or be in charge of an undertaking establishment any more than a person licensed as an architect is authorized to put up a building without a building permit.

In conclusion, we suggest that, inasmuch as some of the above specified practices have been in existence for a period of years, your department ought to give considerable publicity to this opinion and should give notice to the persons interested that a strict compliance with the ordinance will hereafter be insisted upon by your department, also giving

them a limited time in which to comply strictly with the same before commencing prosecutions thereunder.

Respectfully yours,

M. W. CAGNEY,
LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,
Corporation Counsel.

MARCH 26, 1915.

In re BILLBOARD INSPECTION FEES.

S. A. DIES, Esq., Superintendent, Department of Public Safety,
Pittsburg, Pa.

Dear Sir:

Your letter of the 12th inst., relative to fees exacted for the inspection of signs, awnings, bill-boards, etc., addressed to the Mayor, has been referred to me for reply.

I enclose herewith a copy of the Chicago Bill-board Ordinance, portions of which have been amended, together with a copy of an opinion of our Supreme Court, sustaining the validity of section 707. This opinion is not printed, as a petition for rehearing has been filed and is as yet undisposed of.

Under a former Chicago ordinance, an annual license fee for bill-boards at the rate of 50 cents per square foot was required, and this ordinance was held invalid in the case of *Chicago v. Gunning System*, 214 Ill. 628. The fees exacted under the ordinance now in force seem to be legal and their reasonableness has been seriously questioned.

Another case relating to the subject of bill-board inspection fees is that of *Trevary et al. v. Cincinnati*, 22 Ohio Decisions, 671.

For marquises, Chicago exacts an annual fee of \$25.00 when they are not more than 25 feet in length, and where more than 25 feet in length, an additional charge of 50 cents per foot is required.

Trusting that this information will be of service to you,
I remain.

Very truly yours,

LORING R. HOOVER,
Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,
Corporation Counsel.

MARCH 26, 1915.

In re COMPELLING STREET RAILWAY COMPANIES TO PURCHASE
STREET CARS BUILT IN CHICAGO.

HON. EUGENE BLOCK, Chairman, Committee on Local Transportation.

Dear Sir:

In your letter dated March 11, 1915, addressed to John W. Beckwith, Corporation Counsel, you state that there is pending before the Committee on Local Transportation a communication from the Chicago Federation of Labor asking that all cars on surface and elevated lines be required to be built in the City of Chicago.

You also state that the Board of Supervising Engineers points to a provision in the Traction ordinances that the purchase of all materials and equipment shall be done "upon the lowest advantageous terms." Said Board of Supervising Engineers has taken the position that it construes this provision to mean that the purchase of equipment shall be made on the best commercial terms from responsible bidders, regardless of their location.

In compliance with your request for advice on this point, we beg to inform you that there are no provisions in any of the elevated grants which give the city the power to control this situation, nor do we believe that the city would have the power to compel the elevated companies, by ordinance, to build or have their cars or equipment built in the City of Chicago. Such an ordinance would be an unwarranted interference with the private rights of the companies to contract upon the most favorable terms.

The situation with regard to the surface lines is slightly

different for the reason that the ordinances provide how materials and equipment shall be purchased. The following provision is contained in the ordinances of the Chicago Railways Company, the Chicago City Railway Company, and the Calumet and South Chicago Railway Company:

“The Company shall purchase materials and equipment, and employ engineers, superintendents, clerks, foremen and workmen and shall pay all expenses of every nature, including legal expenses necessary to the proper, complete and prompt performance of the above mentioned work, upon the lowest advantageous terms * * *.”

The question arises whether the words “advantageous terms” can be taken to mean, terms advantageous from a point of public policy as much as terms advantageous from a commercial point of view.

We are of the opinion that the language “lowest advantageous terms” means terms which are most beneficial to the companies in the operation of a business enterprise, and from a financial standpoint.

While, of course, many citizens of the city might benefit if cars were constructed in the City of Chicago, yet these benefits could hardly be regarded as beneficial to the companies in their operation of a business enterprise or from a financial standpoint.

Yours very truly,

MAX M. KORSHAK,

Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,

Corporation Counsel.

CHICAGO, MARCH 26, 1915.

In re USE BY PUBLIC OF FURNACE PATENTED BY EMPLOYEE OF THE CITY.

MR. LORING R. HOOVER, Asst. Corporation Counsel, Chicago, Ill.

Dear Sir:

We have received your letter of March 20, 1915, in which you ask us to render an opinion concerning a certain patent and certain questions referred to in a communication from

Mr. O. Monett, Smoke Inspector, to Mr. John W. Beckwith, Corporation Counsel.

The patent in question is No. 1,123,911, granted to H. Misostow on January 5, 1915, for a particular construction of furnace devised by Mr. Misostow while employed in the department of smoke inspection of the City of Chicago. The patent on its face appears to be absolutely valid. The fact that the construction of furnace shown in this patent was devised during July, 1913, and embodied in a furnace installed for Lewis Institute in July, 1913, would not be a public use which would invalidate the patent, owing to the fact that it did not take place over two years prior to the filing of application for said patent.

We have made no investigation of the prior art to determine the validity of the Misostow patent, as we have not been instructed to make such and it is not necessary to an answer to the questions raised by Mr. Monnett.

The questions presented are:

1. Whether, in view of the nature of Mr. Misostow's employment, the city is not entitled to continue to recommend, and the public to use, furnaces such as that designed by Mr. Misostow.

2. Whether persons who have installed such furnaces would be liable, in an action brought by Mr. Misostow against them, for continuing to use the furnaces.

3. If such persons are liable, what form of agreement should be executed by Mr. Misostow that would protect such furnace users against future action by him.

After a conference with Mr. Monnett, we have come to the conclusion that the circumstances under which the patented structure was designed are as follows, viz.:

Mr. Misostow was employed as a smoke inspector, and among other duties he was supposed to assist in designing particular furnaces to meet certain peculiar conditions in separate and individual cases. He was not employed to design or lay out a series of standard plans for furnaces, which plans were to be given to the public, but merely to help the particular individual who might require assistance from the city to meet the requirements of the smoke inspection department

and to comply with the law. In carrying out this duty he designed for Lewis Institute a furnace in July, 1913, and this furnace was installed and constructed according to his suggestions. The plans for this furnace were later submitted by the smoke inspection department to various other individuals, who installed furnaces of a similar type. Mr. Misostow, however, admits that he permitted these later furnaces to be installed without any objection and stood passively by and had no intention and in fact has, at the present time, no intention of taking any action against the present owners of such furnaces.

The first question, then, resolves itself into, first, whether Mr. Misostow abandoned or dedicated the invention to the public by failing to assert his rights, and by passively standing by and permitting his plans to be used by whomsoever desired. If he had continued to permit this general use for a number of years after his patent issued, this fact might be construed into a public dedication. Or, if he had published a statement saying that he would permit anybody to use his plans and to construct furnaces similar to that shown in his patent, the courts would probably hold that the invention had become public property and that Mr. Misostow could not now step in and claim a monopoly.

The facts, however, are clear that within a very short time after the issuance of his patent, Mr. Misostow asserted his right and claimed title to the fruits of his invention. This would be construed to show that he had not intended to abandon his invention and had not obtained a patent with a view to dedicating the same to the public.

The next question for consideration is whether Mr. Misostow's employment was such that the fruits of his invention inured to the benefit of his employer. The law is very clear that where an employe is hired to do certain work and in the course of his employment makes an invention, the employer has at least a right to continue to use the invention in spite of a patent which the inventor later takes out. In other words, the employer has an implied license.

There are numerous cases on this point, among which are: the following, viz.:

Whiting v. Graves, 3 Bam. & A. 222; *Solomons v. United States*, 137 U. S. 342; *L. & B. Company v. Locke*, 150 U. S. 1913; *Gill v. United States*, 160 U. S. 426; *American Tube Works v. Bridgewater Iron Co.*, 26 Fed. Rep. 334; *Pressed Steel Car Co. v. Hansen*, 128 Fed. Rep. 444; *Barber v. National Carbon Co.*, 129 Fed. Rep. 370, and *Schmidt v. Central Foundry Co. et al.*, 218 Fed. Rep. 466.

This right, however, is confined to the employer and does not extend to a successor.

Hatgood v. Hewitt, 119 U. S. 226; *Troy Iron & Nail Factory v. Coming*, 14 Howard 193, 216; *Oliver v. Rumford Chemical Works*, 109 U. S. 75, 82.

In the present case, however, Mr. Misostow was employed merely to help out in particular instances, and not to design a construction of furnace intended for use by the public. His duty was simply to particular individuals who came in for help and he was only required to give them the benefit of his engineering skill. He was not required or expected to invent new furnaces for their particular benefit.

Such being the facts, neither the city nor the public at large has the right to use the invention in the future. A case directly on this point is that of the *City of Boston v. Allen*, 91 Fed. Rep., page 248. In this case a city employe had used a new construction of gangway in building a ferry, and later obtained a patent on it. The court held that he could prevent the city from using his construction in a subsequent ferry which they desired to build.

It follows, therefore, that Mr. Misostow can prevent not only the city, but any individuals hereafter, from installing his construction of furnace (unless, of course, the patent were void in view of the prior part).

The second question is whether persons who have already installed furnaces are liable for past infringement and could be enjoined from further use.

In view of the fact that Mr. Misostow permitted furnaces to be built and never asserted any claims, and in fact was, in many instances, actually concerned with the constructing and designing of the particular furnaces, our conclusion is that

these persons became implied licensees, and are therefore entitled to continue to use the furnaces which are now installed. Furthermore, these persons would not be liable for infringement for having constructed these furnaces, owing to the fact that Mr. Misostow had full knowledge of what they were doing and was, in fact, a party to the constructing of their devices. This, of course, applies merely to the furnaces built in the City of Chicago, as these were the only ones with the building of which Mr. Misostow was actually connected. Those in other cities Mr. Monnett is not interested in.

It is true that in some cases, perhaps, Mr. Misostow actually did not superintend in person the building of the furnaces, but he was in a position to have full knowledge that this work was going on and to take steps to prevent it if he felt that he had a right which he could assert. The fact that he was permitting the city to recommend his furnace is conclusive that he recognized all persons to whom the city actually did recommend his plans as implied licensees.

Our conclusion is:

First, that the city is not entitled to continue to recommend, nor the public to use, furnaces embodying the construction set forth in the Misostow patent.

Second, that persons who have installed furnaces embodying the Misostow construction are not liable for infringement of the patent, but are implied licensees.

Third, while persons who have installed furnaces embodying the Misostow construction during the time of Mr. Misostow's employment and under his direction are implied licensees, nevertheless it might be advisable to obtain some written confirmation of these licenses to better safeguard them against any future action upon the part of Mr. Misostow. To this end, Mr. Misostow might furnish each of the users of such previously installed furnaces with a simple license authorizing the continued use of such furnaces, or he could execute a single license embodying the various licenses and a copy of such general license could be furnished to each one.

For a simple license no particular form of license is required. However, we enclose herewith a form for each par-

ticular case and a form covering all the cases, so that Mr. Misostow can execute whichever he prefers.

Respectfully submitted,

PEIRCE, FISHER & CLAPP.

By GEO. F. FISHER.

MARCH 26, 1915.

In re DELIVERY OF BALLOTS.

TO THE HONORABLE BOARD OF ELECTION COMMISSIONERS OF
THE CITY OF CHICAGO.

Gentlemen:

You ask to be informed whether in our opinion there is a substantial compliance with the law in case the ballots containing the bond propositions to be voted on at the forthcoming election are delivered by the agents of the Board of Election Commissioners to the judges of election on the Sunday and Monday prior to the date of election.

We understand from your Mr. Sapp that it is your intention to send automobile trucks to the residences of the different judges of election with such ballots in the charge of men employed in your office and that same will be delivered to the judges and their receipt taken therefor. This is made necessary by reason of the immense size of these ballots. A sufficient quantity for some of the polling places will weigh considerably more than one hundred pounds.

We find that the law provides as follows:

“The officer so charged with the printing of the ballots shall cause to be delivered to the judges of election at the polling place of each precinct or district, not less than twelve hours before the time fixed by law for the opening of the polls therein, one hundred ballots of the kind to be voted in such precinct or district for every fifty votes cast therein at the last preceding election for State officers; such ballots shall be put up in separate sealed packages, with marks on the outside clearly designating the polling place for which they are intended and the number of ballots enclosed, and receipt therefor shall be given by the judges of election to whom they are delivered, which receipt shall be preserved by the officer charged with the printing of the ballots.”

The strict letter of the law in this respect has never been

observed so far as we are able to learn. It has been deemed impracticable to deliver the ballots to the polling places more than twelve hours before the election and such delivery would necessitate either the presence of one or more of the judges for twelve or more hours before the polls are opened or the leaving of the ballots in some irresponsible party's hands. To overcome this situation it has been the practice of the Board of Election Commissioners to require the judges to call for the ballots and to deliver them to the judges in the office of the Board.

We do not see that the proposed delivery of the proposition ballots by the method you contemplate is any greater or more serious departure from the strict letter of the law than the course that has been pursued with regard to such ballots heretofore. According to our view if the official ballots reach the electors and they are voted in due form this cures any irregularity or informality which may have occurred in the matter of distributing or handling the same to the judges.

We, therefore, see no objection to the plan which you intend to follow.

Yours respectfully,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,

Corporation Counsel.

MARCH 27, 1915.

In re MAXIMUM DEMAND ELECTRICAL METERS.

HON. MONTAGUE FERRY, Commissioner of Public Service.

Dear Sir:

Your letter of the 23rd inst. is received. In this letter you tell us that your department is at present handling a great number of complaints which are caused by the installation of maximum demand indicators upon a connected load of less than 1,500 watts capacity. These complaints, of course, have reference to the method of measuring electricity insisted upon by the Commonwealth Edison Company. You ask us to advise you whether the clause in the rate ordinance, which

gives the city electrician the right to arbitrate these matters, can be so enforced as to compel the company to arbitrate, before the electrician. The question as to whether maximum demand meters already installed shall be removed or shall be no longer used as a means of measuring the maximum demand, in cases where such meters have been already installed and where the installation is less than 1,500 watts.

The provision of the rate ordinance to which you refer is as follows:

“A consumer’s maximum requirement shall be determined by meter measurement, wherever practicable (and in the event of a dispute as to such practicability of meter measurement then the City Electrician shall be the final arbiter of such dispute), if the consumer shall desire such measurement and shall have an installation of not less than one and one-half kilowatts, otherwise it may be fixed by agreement or by the estimated average maximum load as shown by the experience of the company in the same or the nearest similar class of service.” (Council Proceedings for November 26, 1913, p. 2806.)

You will note that the arbitration clause, which is placed in parenthesis in the above quotation, only gives the city electrician the right to arbitrate cases where the dispute has reference to the practicability of meter measurement. In the case under consideration, as appears from your letter, the dispute has no reference to practicability. It has reference only to the justice or fairness of the mode of measurement. Moreover, the arbitration clause has reference only to cases where the installation is not less than one and one-half kilowatts (1,500 watts), whereas the cases you desire to deal with are cases where the installation is less than 1,500 watts.

We, therefore, answer your question by saying that we do not think that the arbitration clause can be so enforced as to compel the company to arbitrate, before the electrician, the question whether maximum demand meters shall be removed, or shall cease to be used in cases where such meters have been already installed, and where the installation is less than 1,500 watts.

Having answered the specific question which you ask, we might go no further. But it may be as well to point out that,

upon the wording of the provision, apart from the arbitration clause, a serious question arises as to whether the company has the right to force a maximum demand meter upon a consumer in cases where the installation is less than 1,500 watts.

The writer of this opinion was present in the Council Committee when the discussion took place which resulted in the insertion of the provision in question. His recollection is that the provision was inserted, at the request of the company, to save them the cost of having to put in these expensive meters in cases of small installations. The company wanted to make the limit 2,000 watts; and Mr. Palmer, as a compromise, finally consented to a limit of 1,500 watts. But, as the provision is worded, it is clearly open to an interpretation which would forbid the company from forcing a maximum demand meter (whether already put in or not) upon a consumer in cases where the installation was less than 1,500 watts. The provision is so worded as to make it impossible to say with confidence how it would be construed if it came before a court. But we are inclined to the belief that the proper construction is the one suggested above; and that, therefore, it is not competent for the company, under this provision as it stands, to force a maximum demand meter upon an unwilling customer whose installation is less than 1,500 watts.

Yours respectfully,

WILLIAM DILLON,
Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,
Corporation Counsel.

MARCH 27, 1915.

In re JURISDICTION OVER SHOOTING ON THE GOVERNMENT PIER.
HON. JAMES GLEASON, General Superintendent of Police.

Dear Sir:

Your letter dated February 27, addressed to the Corporation Counsel, requesting opinion as to who has jurisdiction over the shooting of ducks, etc. at the Government pier, is before me for reply.

The sections of the Code of 1911 which apply to the

subject-matter of your inquiry are sections 942 and 2037 to 39, inclusive, and are as follows:

“942. FIREARMS—PROHIBITION.) No person shall fire or discharge any gun, pistol or other firearm within the city, except upon premises used by a duly licensed shooting gallery, gun club or rifle club, or in accordance with the provisions of section 2038 of Chapter LVII of this ordinance, under a penalty of not less than five dollars nor more than twenty-five dollars for each offense.”

“2037. KILLING BIRDS IN CITY LIMITS.) No person shall kill or wound, or attempt to kill or wound, by the use of firearms, slung-shot, bow and arrow, or other weapon, any bird within the city limits, except as herein-after provided.”

“2038. HUNTING DISTRICT DESCRIBED.—LICENSE AND PERMIT REQUIRED.) Any person licensed to hunt under the provisions of an act of the legislature of the State of Illinois, entitled, ‘An act for the protection of game, wild fowl and birds, and to repeal certain acts relating thereto’ (or under any subsequent act in regard to the same subject-matter), may hunt or kill game birds in the open season as provided by the laws of the State of Illinois, within the following described districts and portions of the city: Upon Wolf Lake and along the shores thereof; upon Hyde Lake and along the shores thereof; upon Lake Calumet and along the shores thereof; upon the Calumet River and along the banks thereof.

Provided, however, that no weapon shall be used for the purpose of hunting such birds or killing or wounding, or attempting to kill or wound such birds, other than a shotgun, and that such shotgun be not discharged anywhere within seven hundred and fifty feet of any building or structure designed or intended for purposes of human habitation or employment, or to be used as a barn or stable. Provided, further, that any person so licensed to hunt and desiring to hunt or kill game birds in the city within the limits herein specified shall first make application, in writing, to the general superintendent of police for a permit so to do, setting forth in such application his name, age and residence, and satisfactory evidence of the possession by him of a hunter’s license as hereinbefore required. Upon such application being received by the general superintendent of police, a permit shall be issued to such applicant, if such applicant shall be of good moral character and of such discretion and understanding as to be safely permitted to hunt game

birds within the city limits in accordance with the provisions of this section."

"2039. PENALTY.) Any person who shall violate any of the provisions of the two preceding sections shall be fined not less than ten dollars nor more than twenty-five dollars for each offense."

The corporate limits of the City of Chicago extend three miles beyond the shore of Lake Michigan, and therefore include the Government pier. The jurisdiction of the general Government over the pier is for harbor and commercial purposes. I am, therefore, of the opinion that the jurisdiction over shooting of ducks, etc. from the Government pier is in the City of Chicago, and that the jurisdiction of the general Government extends no further than as above indicated.

I return herewith communication of A. V. Booth, bearing date of February 26, 1915.

Respectfully submitted,

JAMES G. SKINNER,

Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,

Corporation Counsel.

MARCH 29, 1915.

In re TERM OF CONTRACT FOR DRIED GARBAGE.

HON. GEORGE B. YOUNG, M. D., Commissioner of Health.

Dear Sir:

You referred to this department contract entered into between the city and Harris Brothers Company for the purchase of dried garbage, with a request to be advised as to the time of expiration of same under the terms thereof.

It appears that the advertisement was published April 20, 1914, and called for bids for the purchase and removal of commercially dried garbage during a period of one year. The contract was signed May 28, 1914, and contained the following provision:

"The duration of this contract shall be for three hundred and sixty-five (365) calendar days from the date of this contract."

The order of the City Council authorizing such contract,

passed May 25, 1914 (Council Journal 458-9), also fixed the term at one year.

It seems, however, that the contractor did not start taking garbage until July 13, 1914, at which time thirteen wagons began hauling same and it was not until July 27, 1914, that the contractor started to take all the city garbage delivered. It appears further, that the city was not ready to fully comply with the provisions of the contract until the last mentioned date, and, therefore, it may be said that the commencement of the work under the contract was not actually begun until July 27, 1914, in spite of the fact that a comparatively small amount of dried garbage was delivered during the two weeks preceding that date.

The question now arises whether the period of the contract terminates on May 28 or on July 27, ordinarily, such a question arises by reason of the fact that the contractor claims that he is not bound to fulfill the contract until the expiration of the full term provided therein, if the city delayed him so that he could not commence the work at the time specified. But in this instance, we understand from your letter that it is the city's desire to hold the contractor to the full period instead of the contractor's desire to hold the city. The question of construction of the terms of this contract, therefore, is a difficult one, owing to the fact that the party that desires to insist on the full term is the one which is itself at fault and caused the delay.

If the facts above given were the only ones before us we would not be justified in assuming that the term of the contract has been extended. Where one party to a contract fails to live up to the requirements the other party may do one of several things. He may treat the contract as rescinded he may perform or offer to perform on his part and sue for damages if the other party fails to perform, or he may so conduct himself that a new contract arises by implication. The latter usually occurs where some specific provision of the contract has been waived.

In the present instance it would seem as though the provision fixing a date for the beginning of the term of the contract was waived by the action of the parties.

You stated to the writer that it was evident very soon after the contract was signed that neither party would be ready to perform for some time. The city was not ready to deliver any garbage and the contractor did not have its plant ready to receive it. In fact the plant of the contractor was not ready until after September 1, 1914, although you say that the dry garbage was received and held as soon as the city was ready to deliver it, so that the contractor was never in default but merely acquiescing in the delay.

It also appears that the agents of the contractor were most anxious to retain the contract even though the city was behind in getting its plant in operation, and they expressed themselves as satisfied to have the deliveries begin when the city was ready. No demand was ever made for the product of the city's plant, and no offer of performance or notice of any kind was given to the city. It was a case of waiting to begin operations at such time as both parties were prepared to begin. The deliveries made before July 27th were in the nature of experimental work, the real operation of the plant beginning on that date.

The whole course of conduct of the parties indicated that neither intended to hold the other to strict performance as far as beginning operations is concerned. On the other hand it seems equally clear that as to all other matters the parties intended to live up to the contract. This includes the term, which by this means was simply advanced about two months. Under these circumstances it is plain that the contractor can hold the city for the full term if disposed to do so, and consequently the city must be in the same position with respect to the time of performance.

In the case of *McGowan v. American Pressed Tan Bark Company*, 121 U. S. 575, the court held that where a party contracted to erect machinery on a steamboat within sixty days from the date of the contract, and the boat was not ready for such work until after the expiration of the sixty days, the fact that the contracting party went ahead with the work then, brought into full force the sixty-day provision as of the time when the work was begun. Among other things, the court said, on page 600:

“We see no error in the charge of the court, that, if the defendants proceeded under the contract, they were bound to complete the work within the length of time contemplated by the original agreement, and such additional time as was lost by the delay in the construction of the boat. There is nothing in the bill of exceptions to show that the machinery could not have been erected within sixty days after the boat was ready to receive it. The parties treated the contract as in full force, except as to the time in which it was to be performed, and the work was done and the payments were made under the contract as thus extended in time.”

In that case the owners of the boat claimed that the time limit was in force, while the other party contended that he was not bound by the sixty-day provision, and could only be required to install the machinery within a reasonable time. It is true that the case is somewhat different from the one we are considering, but at the same time, the rule laid down by the court, that the time limit still stands although the parties did not in fact comply with the strict letter of the contract, is applicable in the present instance.

We also call attention to the case of *Graveson v. Tobey*, 75 Ill. 450, in which the court held that where a party contracts to do work by a day named, and he is prevented from commencing the work until about the time for the completion of his work, and he then proceeds under the contract, he will be bound by all of its provisions except as to the date of completing his work, and will be liable for any unnecessary delay on his part. The court says, on page 542:

“There is no dispute in this case as to the quality of materials furnished, the character of the work done, or any thing connected with the performance of the contract, except the time consumed in performing the work. There is no question but the work was done under the contract, and was so understood by both parties, as they both acted under it as though it was in full force, except as to the time in which it was to be performed. Both parties seem to have waived the delay occasioned by the contractor for the iron work. Appellants did not claim that they were released by the delay, but as soon as the building was ready they entered upon and performed the work as required by the contract, claimed pay under and

according to the contract, and finally instituted this proceeding under it, and hence we must, from the action of the parties themselves, conclude that they regarded it as in force and binding in all things, except as to the time when the building should be completed.

“This being true, then appellants were bound in all things else to perform their part of the agreement, and on failing to do so, respond in damages sustained by its breach. When they commenced work they were bound to do their work in connection with the brick work, and so that there should be no delay on account of their part of the work. And they were bound to perform it within the same length of time contemplated by the original agreement. And failing in this they are liable.”

In the case of *Jackson v. Beers*, 14 Cal. 189, the contract was for the delivery of a certain quantity of turpentine which was to be distilled by the party receiving same before a fixed date for joint account; no particular quantity was to be delivered each day. The party receiving the turpentine was to be allowed time for repairs in case of fire. It was held that the allowance of time actually spent in repairs after a fire inured to the benefit of the party furnishing the turpentine as well as to the party receiving it, and that he therefore had a corresponding extension of the time fixed for delivery. We cite this case for the purpose of illustrating that the courts regard a provision that enables one party to extend the time of performance as operating mutually.

In the present instance the contract was for a full year and not for ten months. The bids were on the basis of a full year's contract, in accordance with the advertisement, and the contract itself had the following clause:

“The amount of Dried Product available for sale and purchase is estimated at an average of One Hundred and Thirty (130) tons of Dried Product (ten per cent (10%) moisture and five per cent. (5%) foreign matter) per day of twenty-four hours (24), based on a three hundred and ten (310) working day year; the exact amount depending upon the actual conditions of service.”

There can be no doubt that it was the intention of the parties to have the contract run for the full year, and that the delay was unexpected and not contemplated at the time that the contract was signed. Under these conditions, the con-

tractor would have the right to insist on a full year's performance on the part of the city from July 27, 1914, and the city must necessarily have the same right, otherwise the contract would be lacking in mutuality. There was a waiver, as stated above, in regard to the time of the commencement, but the term remains the same.

Yours respectfully,
LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:
JOHN W. BECKWITH,
Corporation Counsel.

MARCH 30, 1915.

In re SALE OF BOTTLED BEER TO MINORS.
HON. CARTER H. HARRISON, Mayor.

Dear Sir:

We have received from your office "Petition against a saloon at No. 3547 Narragansett Avenue," with notation thereon stating that the application in question is for a wholesale liquor dealer's license and inquiring whether children under the ordinances can buy bottled beer at a wholesale liquor dealer's place.

Section 1543 of The Chicago Code of 1911 provides that no person owning or operating a saloon, dramshop, grocery, *or other place where intoxicating liquors are sold or given away*, shall *sell, give away or deliver* to any minor any malt, vinous, spirituous or intoxicating liquors, either to be drunk on the premises or carried away.

Said section, in our opinion, applies to wholesale liquor dealers' places as well as to dramshops. It follows that neither beer nor any other intoxicating liquor can lawfully be sold, given away or delivered to any minor at a place operating under a wholesale liquor dealer's license, either to be drunk on the premises or carried away.

Yours respectfully,
BRYAN Y. CRAIG,
First Assistant Corporation Counsel.

Approved:
JOHN W. BECKWITH,
Corporation Counsel.

APRIL 1, 1915.

In re POWER OF CITY TO LOCATE CONDUITS FOR VARIOUS UTILITY SERVICES IN SUB-SIDEWALK SPACE.

HON. WILLIAM J. HEALY, Chairman, Commission on Downtown Municipal Improvements.

Dear Sir:

Your communication of the 26th inst., propounding several questions pertaining to the subject of the use of sub-sidewalk space by the city for the purpose of locating various utility services therein, is at hand.

In answering your letter we will, for convenience, subdivide and treat separately the legal questions raised.

I.

IN THE USE OF SPACE UNDER THE SURFACE OF STREETS FOR SUCH PURPOSES NO DISTINCTION EXISTS BETWEEN STREETS OF COMMON LAW AND OF STATUTORY DEDICATION, SO FAR AS THE RIGHTS OF ABUTTING OWNERS TO MAINTAIN VAULTS UNDER SUCH STREETS IS CONCERNED.

The court in the recent case of *People ex rel. Hoyne v. Marshall Field & Company*, 266 Ill. 609, said:

“This court has quite recently had before it for consideration the respective rights of abutting property owners, the city authorities and the public with reference to the use of the space under the surface of the streets, both when the fee was owned by the city and when it was owned by the abutting property owners. In those cases it was decided that the rights of the abutting owners as to the space in the street beneath the surface, when owning the fee in the street, were greater than when the fee was in the city; that when the abutting lot owner was the owner of the fee he had the right to make any reasonable use of the street which did not interfere with the free enjoyment of the public easement therein, whereas when the city owned the fee the abutting lot owner had no rights in it except as granted by the municipality; that in any event, whether the fee title was in the city or the abutting property owner, the street under the surface of the ground could only be used in such a manner as would safeguard the paramount rights of the public to the full and unobstructed use of the street for the purpose for which it was dedicated; *that the city would not be estopped by*

*any action of its own from requiring the space occupied beneath the street to be surrendered to the city whenever it became necessary for the uses of the public. * * **

Keeping clearly in mind the exact question that was involved in each of the different cases, we do not think there is any serious conflict in any of them in this state bearing on this question. All of them, while recognizing the rights of abutting property owners in the street, have endeavored to safeguard the paramount rights of the public in any use of the street which was reasonable or proper at the time or could be fairly anticipated for the future. It is only within a comparatively recent time that the sub-surface of the streets has been used for any purpose by the public. Formerly the abutting property owners used only the sub-surface under the sidewalks for coal vaults or for storage purposes. The public first began to use the space under the streets for sewers and water and gas mains. In recent years the public has begun to use it for telegraph and telephone lines, though these latter are still often placed, under certain restrictions, on poles set in the ground. (*City of Springfield v. Postal Telegraph-Cable Co.*, 253 Ill. 346.) This sub-surface of the streets recently has been taken for almost every sort of a public use. In addition to sewers, water mains and public utilities generally, we find this space used for public lavatories, public cisterns and other kindred public conveniences. It would be difficult, if not impossible, to anticipate with any reasonable certainty the future uses, either above or below the surface of the street, which may be required in the interests of the public. Under the authorities cited, the conclusion must be reached that a municipality has the power to permit the owners of adjacent property to use the space beneath the surface of the street, even when the city owns the fee, in any manner not inconsistent with the public necessity for street purposes.
* * *

Under the authorities in this as well as other jurisdictions, if the sub-surface of the street is needed by the public for travel or other public uses, the mere fact that such public use will deprive abutters of the use of vaults and other similar underground structures in the street theretofore maintained, cannot stand in the way of the construction of sewers or subways. * * *

In the case of *Sears v. City of Chicago*, 247 Ill. 204, the court at page 217 says:

“The abutting lot owner thus being the owner of

the fee to the center of the street upon which his lot is located, has the right to make any reasonable use of the same which does not interfere with the full enjoyment of the easement which is held for the use of the public."

In the case of *Sears v. Crocker*, 184 Mass. 586, 69 N. E. 327, the court in discussing the power of the City of Boston to construct a subway under its streets says on page 320:

"It hardly can be contended that this is an unreasonable mode of using the streets in reference either to travelers or abutters. If it is not an unreasonable mode of using them, the mere fact that it deprives abutters of the use of vaults and other similar underground structures in the streets which they have heretofore maintained, is of little consequence. Abutters are bound to withdraw from occupation of streets above or below the surface whenever the public needs the occupied space for travel."

In the case of *Deshong v. New York*, 176 N. Y. 475, the court at page 479 says:

"It seems to have been assumed by both parties that if a proper permit had been previously granted the plaintiff had a right to continue his new vault in place of the old one without an additional permit or further compensation. With this assumption we are disposed to agree, subject, however, to the condition that its continuance would not interfere with the street or impair its use by the public. Whenever the existence of a vault would interfere with the public use of the street, the right to maintain it must be held to terminate, as the rights of individuals under such permits must be regarded as subordinate to the necessities or requirements of the public."

Numerous other authorities may be cited to the same effect, that the public use of streets is paramount to any private use of the same irrespective of the question as to whether or not the fee in the street is owned by the city or the abutting property owner. Where the city does not own the fee in the streets it has merely an easement, and in such cases it cannot prevent the use of the sub-surface of streets by the holder of the fee so long as such use in no way interferes with the public use of the street. Of course, in such a case reasonable regulations may be made by the city as to the manner of the use by the owner of the fee.

In such cases the question also arises as to whether or not

the public use of the street is of such a character as to create an additional servitude and compensation must be paid the owner of the fee in cases where the public use creates an additional servitude. So far as the sub-surface of the streets is concerned this situation might arise in the use of space in such a street for public lavatories, although we express no opinion on this question. The use of the surface of the street, where the fee is not in the city, by commercial railroads has been held in this state to create an additional servitude for which use compensation must be paid the owner of the fee.

O'Connell v. Chicago Terminal R. R. Co., 184 Ill. 308-325.

Davenport Street Railway Co. v. Johnson, 188 Ill. 472.

Wilder v. Aurora, etc., Trac. Co., 216 Ill. 493.

Gillette v. Aurora Railway Co., 228 Ill. 261.

II.

THE CITY MAY USE THE SUB-SURFACE UNDER ITS STREETS FOR THE ACCOMMODATION OF UTILITY SERVICES TO THE EXCLUSION OF THE USE OF SPACE THEREUNDER BY ABUTTING PROPERTY OWNERS AND THE CITY'S DETERMINATION THAT A PARTICULAR PORTION OF A STREET IS REQUIRED FOR PUBLIC USE IS FINAL IN THE ABSENCE OF FRAUD OR CAPRICIOUS OR ARBITRARY ACTION.

On this question I call your attention to an opinion rendered the City Council by John W. Beckwith, then First Assistant Corporation Counsel, appearing on pages 42 to 45 of the Journal of the Proceedings of the City Council of April 21, 1913.

In the case of *Gregsten et al. v. City of Chicago*, 145 Ill. 451, the city sought to revoke a permit for the maintenance of a vault under an alley, which it had previously authorized, for the purpose of permitting the use of a part of such space by an abutting owner on the opposite side of said alley. The court recognized the city's right to revoke the permit, which in this case was held to be a contract, whenever public interest or convenience demanded the use of the same. The court at page 465 says:

"It is not pretended that the interests of the public

demand, or its convenience requires, the removal by Gregsten from the vault, or its abandonment and a resumption by the city of absolute control over the alley.”

In the case of *City of Chicago v. Norton Milling Co.*, 196 Ill. 580, the court, at page 587, says:

“The vault spoken of was beneath the street and not an obstruction of any kind, and the city is not estopped by the contract from reclaiming this space whenever necessary for the uses of the public.”

In *Kittaming Borough v. National Gas Co.*, 26 Pa. Sup. Ct. 346, the court on page 360 says:

“The right of the public in a city or borough street is by no means confined to the surface of the way, and this all who set apart land for a street are conclusively presumed to know. Elliott on Roads, 2d Ed., Sec. 17.”

In *Dempster v. Union Traction Co.*, 205 Pa. 70, the court at page 76 says:

“It is a settled law that abutting owners on streets and alleys in cities and boroughs have no claim for damage by reason of the appropriation of the surface or sub-surface for public improvements to the advantage and benefit of all the inhabitants.”

In *National Subway Co. v. St. Louis* (145 Mo. 571), 42 L. R. A. 113, the court at page 127 says:

“It must be obvious that the same considerations which apply to the use of streets for poles bearing wires above, must also apply where conduits for such wires are excavated below, the surface of the streets. Any theory which would deny that the use of the wires in conduits under the surface of the streets, as contemplated in the charter and franchises of the National Subway Company, to be a public use, would with equal propriety condemn the tunnel company (which built its tunnel under the streets of St. Louis, and then leased its belongings, tracks, etc., to the Terminal Railroad Association of St. Louis, which owns the engines that haul all the trains over the bridge owned by the Illinois & St. Louis Bridge Company through the tunnel and into the Union Station, owned by the Union Depot Company of St. Louis), on the ground that the tunnel company was operating its tunnel merely for its own private gain, and not for a public use. Surely, the mere size of the hole in the ground, its depth below

the surface of the street, whether it be called tunnel or conduit, or the purposes to which it is applied, whether it be the transportation of passengers or messages for hire, cannot alter or in any manner change the nature of the use to which either method of transmission is applied."

In *Western Union Telegraph Co. v. Electric Light and Power Co.*, 70 N. E. R. 866, the plaintiff sued to restrain the defendant from maintaining a street subway in close proximity to plaintiff's subway previously constructed and to compel defendant to remove its lines therefrom. The court on page 867 says:

"Space beneath the surface of streets in our large cities is becoming more valuable every year for the purpose of conducting water, heat and light to the dwellings of the inhabitants, as well as for the construction of sewers, underground railroads, subway lines, pneumatic tubes and other agencies of great public utility. The existence of surface railroads frequently renders access to the various structures beneath the streets more or less difficult, and makes it undesirable that subways or other structures should be located under the tracks. It is in view of such circumstances and possibilities that a franchise granted by a city permitting a corporation to place some structure beneath the surface of the streets is to be considered and construed. When, therefore, the common council, in granting a franchise to the plaintiff, provided that nothing therein contained should be deemed to give it 'any exclusive franchise to use the streets for a subway or for any other purpose,' and reserving all rights and privileges not specifically given, it did not empower the plaintiff to dictate what other structures should be located beneath the streets, or where they should be placed. All that the plaintiff can lawfully demand is that its structure shall not be unreasonably interfered with. This is involved in the terms of its grant, when construed in the light of all the facts. It cannot keep out other structures, even if their construction involved expense and inconvenience to itself. It cannot say there shall be no subway above, beneath or on either side of its own, for that right the city reserved, and doubtless it would have been reserved by implication if it had not been reserved expressly. The franchise 'is to be construed in the interest of the public, and hence in favor of the grantor, and not, as in ordinary cases, in favor of the grantee.' "

The court also says on page 868:

“There is nothing in its franchise to prevent the city from laying a subway on any side of the plaintiff’s subway, and immediately adjoining it, or from authorizing some other corporation to do it. If the city, which has control of the streets both above and below the surface, sees fit to economize space with reference to the wants of the future, it has a right to do so, and for this purpose to place, or authorize another corporation to place, conduit lines so near that of the plaintiff as to make access somewhat inconvenient and expensive. The city cannot destroy the plaintiff’s line, nor prevent reasonable access to it, but it is not obliged to consult the mere convenience of the plaintiff, nor study to save it from expense, to the detriment of the public. In other words, the plaintiff may make a reasonable, but not an unreasonable, use of the right granted.”

In *Bryn Mawr Water Co. v. Lower Merion Township*, 15 Pa. Co. Ct. 527, the court at page 528 says:

“When the water company obtained the right to occupy the highway it was, however, subjected to the rights of the public; and if at any time it became necessary for the public good that their pipes should be changed, they must act accordingly. It is not reasonable that a corporation could occupy the highways in such manner as either to interfere with travel or obstruct necessary drainage. No man can foresee what may in all cases be required in the future; and although the supervisors may have been satisfied with the original location of the pipes, subsequent events may convince them that a change is necessary.”

In the case of *In re Deering*, 93 N. Y. 361, the court at page 362 says:

“For aught that appears here, although it has authority to lay its pipes through the public streets, the company took the risk of their location and should be required to make such changes as public convenience or security requires, and at its own cost and charge.”

In *Kirby v. Citizens Ry. Co.*, 48 Md. 168, the court at page 170 says:

“The power to construct sewers is expressly conferred on the city authorities by Sec. 835 of Art. 4 of the Code of Public Laws.

In the exercise of this power they have the right not only to obstruct, but to discontinue entirely the use of Carey street as a highway, so long as it may be necessary for the purpose of constructing a sewer under the bed of the street.

The easement acquired by the appellee under its charter and the ordinances of the Mayor and City Council is subject to this paramount right, and in constructing its railway the appellee knew or was bound to know that its use of the bed of the street for railway purposes was liable at any time to be interfered with, whenever the city authorities might deem it necessary for the public welfare.

They had no right of course to interfere capriciously or unnecessarily with the appellee's use of the street; but they were under no obligation to incur the expense either of shoring up the railway track or removing it to the one side of the street. * * * It is apparent from the bill that the sewer could not be constructed without interfering with the railway track of the appellee, and whatever injury may result therefrom must be regarded in law as '*damnum absque injuria*.' "

In *Macon Consolidated Street Railway Co. v. Macon*, 112 Ga. 782, the court at page 787 says:

"The City of Macon having no power to make a contract whereby it surrendered its power to require the plaintiff in error to move its tracks from one part of the street to another, whenever such removal was necessary for the public welfare, such an agreement made by the city cannot be used as the foundation for an estoppel to prevent the city from exercising its discretionary power to require such a change to be made."

In view of the foregoing cases, we are of the opinion that the city may compel the surrender of the use of sub-sidewalk space by abutting owners in order to accomodate various public utility services, provided it does not act fraudulently or capriciously in the matter.

III.

STEPS TO BE TAKEN BY CITY TO SECURE POSSESSION OF SUB-SIDEWALK SPACE OCCUPIED BY ABUTTING OWNERS.

In the case of *Lincoln Safety Deposit Co. v. New York*, 96 N. Y. App. 624, the court says:

“The plaintiff’s vault privileges were duly revoked by the city and its rights to maintain and occupy the vaults thereafter ceased. (*Deshong v. City of New York*, 176 N. Y. 475.) The vaults were required for a public purpose. (*Sun Publishing Co. v. Mayor*, 152 N. Y. 257.) * * * If the plaintiff failed to remove the property in the vault after notice of the revocation of the license to maintain and occupy, and abandoned it, the removal by the city or the contractor was justified. * * * The vault rights were subject to termination on notice when the street was required for a public purpose.”

In the case of *Monongahela City v. Monongahela Electric Light Co.*, 3 Pa. Dist. Rep. 63, a mandamus was issued to compel the defendant company to remove its poles in the streets that the city could improve them.

We are of the opinion that to secure possession of sub-sidewalk space occupied by abutting owners the city should revoke the permits authorizing the use of such space and notify the occupants to abandon it within a specified time, which should be of sufficient length to permit the removal of private property contained in such vaults. Upon expiration of the time specified in such notice the city may then proceed to construct whatever conduits it finds necessary for public use, and in so doing may remove whatever structures may interfere with this work.

IV.

THE CITY MAY COMPEL PRIVATELY OWNED PUBLIC UTILITY COMPANIES TO RELOCATE THEIR SERVICES UNDER THE SUB-SURFACE OF STREETS.

(a) The public utility companies may be required to bear the expense of such relocation if the space now used by such companies is required for use by the city for public purposes, such as the construction of sewers, or the construction of a municipal subway. The case of *Western Union Telegraph Co. v. Electric Light and Power Co.*, 70 N. E. 866, cited and quoted from on pages 8 and 9 of this opinion, treats this question.

In the case of *New Orleans Gas Company v. Drainage Commission*, 197 U. S. 453, appeal from 111 La. 838, the court held that imposing upon a gas company the cost of a change

in the location of its pipes and mains necessitated by the construction of a drainage system, does not impair its contract rights acquired under its exclusive franchise, to supply gas to the city through pipes and mains laid in the streets, and that such gas company has no such property rights in the location of its pipes and mains as to make the imposition upon it of such cost a taking of property without compensation.

The court says at page 461 :

“The gas company did not acquire any specific location in the streets; it was content with the general right to use them, and when it located its pipes it was at the risk that they might be, at some future time, disturbed, when the state might require for a necessary public use that changes in location be made.”

In *Gas Light Co. v. Village Corporation*, 92 Me. 493, the court at page 496 says :

“The plaintiff by its charter, Private and Special Laws of 1854, Chap. 201, obtained ‘the right to lay gas pipes in any of the public streets and highways of the Town of Brunswick, the consent of the selectmen of said town having first therefor been obtained.’ But this was not an absolute right. It was only a qualified right. It was not paramount, but subordinate. The placing of its pipes in the streets, with the consent of the selectmen, did not give the plaintiff the vested right to have them remain as placed undisturbed. Its right was subordinate to the rights of the public in the use of the streets; and it was subject to the power of the legislature to authorize additional public uses of the streets, and that without providing for the payment of compensation for incidental and consequential damages occasioned by such uses. Notwithstanding the provisions in the plaintiff’s charter, we think it cannot be successfully claimed that the legislature did not still possess the power to authorize the construction of sewers in the streets, although by such construction the plaintiff might be put to inconvenience, damage and loss.”

In *National Water Works Co. v. Kansas City*, 28 Fed. 921, the court holds that a water company in laying its pipes in the streets does so subject to the right of the municipality to construct sewers, and cannot recover the expense incurred in relaying pipes if the city is not unreasonable or malicious in the construction of its sewers.

The case of *Water Commissioners v. Hudson*, 13 N. J. Equity 420, holds that the expense in lowering water pipes as a result of a change in the grade of streets must be borne by the water company, and the court at page 424 says:

“The owner of the soil has a common law right to the use and enjoyment of the soil under the highway. He may open a mine, construct vaults or chambers, erect machinery, lay water pipes or exercise any other right of ownership in the soil not inconsistent with the public easement, but all these rights are held and must be enjoyed in subordination to the public right of way, including the right of construction, alteration and repair.”

In *Anderson v. Fuller*, 51 Fla. 380, 6 L. R. A. (n. s.) 1026, the court says:

“A water company, placing its pipes in the streets under a franchise contract with the city, does so in subordination to the superior rights of the public, through its duly constituted municipal authorities, to construct sewers in the same streets whenever and wherever the public interest demands; and if, in consequence of the exercise of this right, the water company is compelled to relay its pipes, in the absence of unreasonable or malicious conduct, it has no cause of action against the corporation for reimbursements on account thereof.”

(b) The city cannot compel public utility companies to use galleries constructed by it and pay a rental for such space, first, if the public use of the space under the streets does not require that the services of such companies be placed in such galleries, and, second, if the companies abandon their services in the streets in which the galleries are constructed.

Whether or not utility companies can be compelled to bear the expense of relocating their services by placing the same in galleries and pay a reasonable compensation for the use of the same against their will in streets in which other public uses, together with the galleries, take up the entire sub-surface of the streets, presents a question which, so far as we can learn, has never been passed upon by the courts and involves the determination of the extent to which the police power of the city may be exercised.

We are of the opinion that under its police power the city may charge a reasonable compensation in such cases, al-

though this question is one of grave doubt. This power should be exercised by ordinance. Of course, the city has power to charge compensation for the use of utility galleries if this right is reserved to the city in the grant under which authority is given for the location of such services or if the consent of the owners of such services is secured.

In the concluding paragraph of your letter you ask us to discuss any other points which are raised in the same, but concerning which an opinion is not expressly asked for. We, therefore, will take up the question as to whether or not the City of Chicago has the power to construct subterranean passageways under its streets for the purpose of renting the space therein to privately owned public utility companies.

A careful review of the powers delegated to the City of Chicago fails to disclose any express power to do this. Power to control the use of streets is expressly given to the city by the 7th, 9th, 13th and 14th clauses of paragraph 1, Article V, of the Cities and Villages Act, which clauses are as follows:

“7th. To lay out, to establish, open, alter, widen, extend, grade, pave or otherwise improve streets, alleys, avenues, sidewalks, wharves, parks and public grounds and vacate the same.

9th. To regulate the use of the same.

13th. To regulate the openings therein for the laying of gas and water mains or pipes and the building and repairing of sewers, tunnels and drains, and erect gas lights. * * *

14th. To regulate the use of sidewalks and all structures thereunder. * * , *”

Numerous other clauses confer additional powers over streets upon the city, but the foregoing powers seem to relate particularly to the subject under consideration. The powers conferred, however, all deal with the subject of regulation of streets by the city, and do not contemplate the construction by the city of conduits under its streets which may be used to house public utility services any more than these clauses authorize the city to construct subways under its streets.

We must, therefore, conclude that the city has no power to construct subterranean passageways under its streets for the sole purpose of renting the space therein to public utility

companies for the housing of the services of such companies. The question then presents itself as to whether or not the city is empowered to construct subterranean passageways for any purpose. That it has such power must be conceded. It may construct such passageways for the purpose of placing therein its sewers, its water pipes and such wires and pipes as may be necessary in the lighting of its streets and for other purposes. Having such power can it construct such passageways and charge for the use of portions of the same by privately owned public utility companies? That the city in constructing public works may anticipate future needs and utilize its excess space by renting the same to private individuals for private uses seems to be a well settled legal proposition. Dillon on Mun. Corp., 5th Ed., Sec. 997, pages 1594 to 1596, says:

“In erecting or acquiring public buildings for corporate purposes a municipality is not restricted to its present necessities, but may anticipate and make provision for its reasonable future necessities. Although the building may be held for public use, the municipality may allow the entire building, or a part thereof, to be used incidentally for private purposes for compensation, and may make leases of surplus space for the purpose of deriving an income therefrom, provided, always, such private use or such leases do not interfere with the application of the building to the legitimate public needs of the municipality. But although the municipality may make reasonable provision for future wants in erecting a public building and may lease the surplus space resulting therefrom, it will not be permitted under cover of so doing to erect a building not in fact for public needs as they may arise, but for the express purpose of devoting the building to private purposes, wholly or in part.”

We are therefore of the opinion that the city has the power to construct subterranean passageways under its streets, provided the primary purpose for the construction of the same is the housing of services owned by the city.

In conclusion, we suggest that your commission ascertain what uses are made of the sub-surface of streets under which you propose to construct a municipal subterranean passageway that the nature and conditions of the grants authorizing such occupation may be specifically considered, as it is practically

impossible to anticipate every question which might arise in advance of a knowledge of the actual facts.

Very truly yours,

LORING R. HOOVER,
Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,
Corporation Counsel.

APRIL 5, 1915.

In re POWER OF CITY TO GRANT AN EXCLUSIVE FRANCHISE FOR
THE OPERATION OF MOTOR BUS LINES ON ANY STREET OR
STREETS.

HON. EUGENE BLOCK, Chairman, Committee on Local Transportation.

Dear Sir:

In your letter dated March 25, 1915, addressed to John W. Beckwith, Corporation Counsel, you asked us to furnish the Committee on Local Transportation with an opinion as to the powers of the city to grant an exclusive franchise for the operation of passenger motor omnibuses over any street or streets. Replying thereto, we have to say:

There is no question that the city is granted ample power in and by the Cities and Villages Act to regulate the use of streets, and that under such power the city can pass reasonable rules and regulations affecting the use of streets.

The power to regulate the use of streets, however, does not include the power to create a monopoly. Where privileges are granted by ordinance they should be open to the enjoyment of all, on the same terms and conditions.

City of Chicago v. Rumpff, 45 Ill. 90.

Tugman v. City of Chicago, 78 Ill. 405.

An ordinance granting an exclusive franchise for the operation of motor omnibuses over any street or streets would be a grant of privileges to the use of streets of the city to one person or corporation which is denied to others. Such grant of privilege would be in violation of the Fourteenth Amendment of the Constitution of the United States, which guarantees to every person within its jurisdiction "the equal protection of the law."

The city holds the fee to the streets in trust for all cit-

izens who desire to use such streets. An exclusive franchise for the operation of passenger motor omnibuses over any street or streets is violative of the purposes for which streets are dedicated, and we are of the opinion that an ordinance granting an exclusive franchise for the operation of passenger motor omnibuses over any street or streets cannot stand the test of legality.

Very truly yours,

MAX M. KORSHAK,
Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,
Corporation Counsel.

APRIL 13, 1915.

In re DATE UPON WHICH CITY CLERK TAKES OFFICE.

TO THE CITY CLERK OF THE CITY OF CHICAGO.

Dear Sir:

We have been requested informally to determine who is the city clerk of the City of Chicago, assuming that on April 6th last a city election was held in the City of Chicago for all city officials including that of city clerk; that the votes cast at said election for city clerk have been regularly canvassed by the Canvassing Board designated by law, and that John Siman has been declared elected city clerk by said Canvassing Board and an order to that effect entered upon the records of the County Court, and that said John Siman has taken the oath of office and filed his official bond, approved by the City Council of the City of Chicago.

The question which has arisen is whether the incumbent, Francis D. Connery, is entitled to hold his office and perform the duties thereof until the period of two years has elapsed since he took hold of the office of city clerk by qualifying thereto after his last election, or whether his right to hold office terminates upon the qualification of his successor.

The only provisions in the Cities and Villages Act relating to the terms of the various officers of the city government are found in Section 2 of Article IV of said act and Section 1 of Part 2 of Article XII of the same act.

Section 2 of Article IV is part of the original enactment of the Cities and Villages Act of 1872 and was amended in 1877. It reads as follows:

“At the general election held in 1877, and biennially thereafter, a mayor, a city clerk, a city attorney, and a city treasurer shall be elected in each city; provided, that no person shall be elected to the office of city treasurer for two terms in succession.”

Section 1 of Part 2 of Article XII reads as follows:

“The mayor of the City of Chicago shall hold his office for four years and until his successor is elected and qualified.”

The last provision quoted was adopted by the City of Chicago in 1905 and so far as the office of the mayor is concerned the latter section supersedes that first above quoted.

It will be noted that the statute provides that the city clerk shall be elected biennially, but does not state when the term of office should begin or end. We are of the opinion that one elected to the office of city clerk becomes city clerk as soon after the election as the result thereof is declared by the Canvassing Board and the person elected qualifies, and that John Siman became the city clerk as soon as he took his oath of office and his official bond was filed and approved by the City Council.

Respectfully submitted,

JOSEPH F. GROSSMAN,
Assistant Corporation Counsel.

Approved:

BRYAN Y. CRAIG,
Acting Corporation Counsel.

APRIL 19, 1915.

IN re PLANS OF SLAUGHTERING PLANTS TO BE SUBMITTED ON
APPLICATION FOR A LICENSE.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

You have asked to be advised as to the proper interpretation of the ordinance requiring the submission of plans and specifications of buildings to be used as slaughtering, render-

ing or packing establishments when an application for a license is made.

The portion of the ordinance that is involved in the questions in dispute appears in Section 1328 of The Chicago Code of 1911, and reads as follows:

“Any person or corporation desiring such license within the city, or within one mile of the present or future limits thereof, shall make written application therefor to the commissioner of health, in which application shall be described the location at which said business is proposed to be carried on, the plans and specifications of the building or buildings to be maintained and used therefor, the details of construction, devices and appliances to be employed, and the proposed manner of operation.”

The city unquestionably has broad powers with regard to the control and regulation of such plants, and an ordinance which requires the submission of plans and specifications to the proper health officer before a plant can be operated comes within the police powers of the city. We do not apprehend that this is disputed, but that the precise question in the present instance is whether such plans and specifications can be demanded from the owners of plants now in operation when application is made for the renewal of the license.

A number of representatives of packing firms and corporations who had been notified to produce such plans and specifications made the assertion to the writer that at some time or other, just when was not stated, such plans and specifications had been submitted in each instance, but that the same had been lost sight of, and that to again produce them would in some cases entail enormous expense and require a great deal of time.

We are of the opinion that it is not the intention of the City Council that a set of plans and specifications shall be presented with the application for a license each year, and consequently wherever it can be shown that the same were exhibited to the commissioner of health it would seem that the ordinance has been complied with. We apprehend that the difficulty lies in the probability that plans and specifications for the older buildings used by these concerns have not been submitted in this way.

The ordinance regulating such plants was originally passed on February 23, 1905, in substantially its present form and re-enacted in the Codes of 1905 and 1911, so that it has remained in force continuously for over ten years.

An examination of the Revised Code of 1897 and the ordinances passed relating to this subject-matter from the time of its enactment to February 23, 1905, discloses the fact that prior to the last mentioned date no submission of plans was required in connection with the licensing of such plants, although at least enough to show the general plan of construction of the building had to be exhibited before a building permit could be secured under the building code then in force.

It would seem that with the enactment of the ordinance of February 23, 1905, there was a radical change of policy with reference to the regulation of such occupations. Before that time there were rendering districts defined by ordinance within which these businesses were confined, the theory doubtless being that they could not be carried on without offensive odors and other objectionable features and that the only effective way of controlling them was to keep them within fixed areas. The new ordinance did away with the rendering districts, but established a more rigid system of inspection. The requirement relating to the submission of plans and specifications was therefore clearly intended to be used as a basis for the future continuous and systematic inspections of the operation and maintenance of such plants as contemplated by the new ordinance.

This view is further borne out by the fact that there seems to be no special requirement for buildings designed for housing such businesses in either the building code or the health code different from those required for other manufacturing plants. Hence, neither the commissioner of buildings nor the commissioner of health would have occasion to examine such plans or specifications even when a new plant is about to be constructed for any other purpose than to see that the general building and health requirements in manufacturing plants are lived up to, and they could not demand any particular kind of construction or specify any detail that would have to be complied with except as in other buildings; and it

follows that this requirement has to do with the product of the plant and the manner of operation rather than with the structure. The commissioner of health could not stop the operation of a plant if the plans and specifications did not suit him, but could do so if under these plans the product was of such a nature as to be unsanitary or the operation of the plant created a nuisance. This may appear at first blush a fine-spun distinction, but is nevertheless founded on the law, which does not assume that either an unsanitary product or a nuisance will be created until it actually manifests itself.

The very fact that the plans and specifications must be submitted at the time of applying for a license instead of when the building is about to be constructed and equipped seems to be conclusive on the point that they were intended to be used by the commissioner of health for the purpose of enabling him to maintain a more complete and thorough inspection than otherwise.

Such being the case, it follows that when the ordinance was passed it placed within the power of the commissioner of health the right to demand a complete detailed plan of any buildings and equipment to be used for this purpose before the mayor could be compelled to issue a license in all cases when a new plant is about to be established, and the right to require a reasonably accurate draft or outline sufficient for the purposes of inspection of buildings already in existence. In the case of existing buildings we assume that the commissioner of health would not require such detailed plans as he might want when new buildings are about to be placed in operation.

If these requirements were met at any time during the ten years since this ordinance has been in force, an applicant for a license cannot again be put to the expense of preparing plans even if the ones originally submitted have disappeared. The language of the ordinance clearly precludes the idea that an applicant must submit them each time that he seeks a renewal of his license.

The sentence which we quote from same above in itself shows the intention of the City Council in this regard. The use of the word "proposed" in two places, and the words "to

be," also appearing in two places, indicates that the provision applies to a plant about to be established. But aside from that we find other language in the ordinance which assists us in arriving at a proper interpretation of same. Thus, in Section 1329, where the provision for notice to the aldermen of the ward appears, there are two places where it is made plain that the provision is intended to apply to plants already in existence as well as to those about to be established, and it follows that in the absence of such precise language in the other parts of the ordinance we have another indication of the intention of the law making body. Again, the use of the words "from time to time," at the beginning of Section 1328, coupled with the phrase "as an annual license fee" in Section 1329 convey the impression that the original qualification of a party for a license does not necessarily limit his right to same for one year only but that it holds good until such time as there is some change in the status which requires that he shall again qualify.

Besides, it would be unreasonable to demand a new set of plans and specifications of a large plant each year, and entirely unnecessary from every point of view.

We are therefore of the opinion that the commissioner of health has ample power to require a draft or outline sufficient for purposes of inspection and regulation from applicants who desire to renew licenses for existing plants where no such plans have ever been presented, but that he would not be justified in demanding them if at any time since the ordinance went into effect such plans had been submitted. We believe such an interpretation of the ordinance both reasonable and fair to the packers who are protesting.

If such plans and specifications have actually been presented, as is contended, and they have been lost, there ought to be some way of getting together on what may be necessary in order to enable the commissioner of health to properly inspect and control the business in each case without putting the applicant to great expense. Whether the plans have been lost or whether the department has allowed the matter to run along for so great a time without demanding the plans, such laxity in either event must be taken into consideration in ar-

iving at an understanding which will cause the least possible expense and trouble to the parties whose plants are presumably operating within the law. Under the circumstances, we recommend that, pending the adjustment, the licenses ought to be issued as heretofore, since nearly four months of the term has already passed.

Yours respectfully,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

BRYAN Y. CRAIG,

Acting Corporation Counsel.

APRIL 21, 1915..

In re FRANK PARMELEE COMPANY LICENSE.

HON. EDWARD COHEN, City Collector.

Dear Sir:

You referred to this department a long time ago an application made by the Frank Parmelee Company for a license to engage in the business of operating public vehicles of the class defined in Sections 2663 to 2666 of The Chicago Code of 1911.

The sections above referred to relate to public passenger vehicles which are not operated by the owners from any public cab or hack stands and do not use the streets or public ways of the city for the purpose of securing or soliciting employment.

In the application above referred to it is stated that this company has about seventy vehicles of the type ordinarily known as the closed coupe automobile seating four passengers; that they are usually kept in the main garage owned by the company on West Monroe street and that they are also kept waiting temporarily on private property inside of or near-by the several railroad passenger terminal stations of the city while waiting to be hired to patrons secured through the agencies of the company located within such railroad stations. It is explicitly stated in the application that they are not kept on public cab or hack stands and do not wait on streets or public places or ways of the city.

The question in the precise form in which it is presented at the present time has already been passed on by the law department. The chief reason why the matter has been held up was that the judiciary committee of the city council had under consideration a new ordinance relating to public passenger vehicles. This committee originally contemplated changing the definition of public passenger automobiles requiring licenses under Section 2588 of the code so as to include vehicles operated in the manner above described. The ordinance prepared by the committee has, however, been presented and passed by the city council and no change was made in the last mentioned section, which reads as follows:

“No automobile, autocar or other similar vehicle which shall stand or be kept upon any public cab and hack stand or upon any street or public way in the city, for employment, shall be used anywhere within the city for the carrying or conveying of persons for hire or reward unless such vehicle shall be licensed as hereinafter provided.”

Taking the situation as it actually exists at the present time, according to the statements made by the representatives of the company, there seems to be no reason for regarding them as public passenger vehicles within the meaning of Section 2588. In other words, these vehicles do not stand and are not kept upon any public cab or hack stands or upon any street or public way in the city waiting for employment. Consequently, they need not be licensed separately as public passenger vehicles, but a general license under Article VI of the chapter on vehicles in the code is sufficient for the business.

The reason why there was so great a misunderstanding with reference to the status of this company in respect to whether or not these vehicles were to be regarded as public passenger vehicles within the definition of Section 2588 was because it was learned, after the opinion was given by this department holding that they were not included within said section, that they had actually taken out licenses under that section. This necessarily placed the City in a position where it had to treat these vehicles as public passenger automobiles. Having obtained a license as such, the persons operating same were entitled to all the privileges that public passenger automobiles had and consequently they were bound to observe all

the requirements of the ordinances regarding such vehicles. Moreover, the Parmelee Company having itself made application stating that they desired licenses for these vehicles as public passenger vehicles, this had to be regarded as being the most authoritative statement concerning the status of these vehicles that was before the officers of the City.

There were other complications which arose. For instance, one of the judges of the municipal court held that the use of the public runway in one of the terminal stations of the city by the Parmelee automobiles constituted such a use of the public ways of the city as brought them within the terms of Section 2588. It is true that this may have applied only to those vehicles that were actually in use at that particular place, but it was assumed that all of these automobiles were interchangeably operated and therefore that at some time during the year each of the vehicles owned by the company would use that particular runway. There were other matters which arose from time to time which tended to complicate the situation. The City at one time started prosecutions on the theory that the company had voluntarily placed itself within the terms and limitations prescribed for public passenger automobiles. Even after the controversy arose in 1913, the company again took out public passenger automobile licenses for the year 1914 and the difficulties of the situation were increased by the fact that it was contemplated at that time that all vehicles carrying passengers for hire within the city should be placed within the same category.

We see no reason, however, for any further question concerning the matter. The different opinions given by the law department are entirely consistent with each other. The complications above referred to arose through the acts of the company and not through any variation or conflict between the opinions rendered in this department, which were all written by the undersigned with exactly the same conception of the law in mind at all times.

The present status of the Frank Parmelee Company, if it keeps within the strict letter of the statements made in the application for a license under Article VI of the chapter on vehicles, is that it is entitled to a license as an operator of

public automobiles under said Article VI and that it is not necessary for this company to take out separate licenses for its vehicles under Section 2588. We do not mean by this that this company will not render itself liable in case it actually solicits employment on the public streets or keeps its vehicles standing on public cab and hack stands, but as long as it refrains from doing this there ought to be no further difficulty about its rights under the ordinances of the city.

Yours respectfully,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,
Corporation Counsel.

APRIL 22, 1915.

In re LEGAL STATUS OF SEVENTY-FIRST STREET, BETWEEN COTTAGE GROVE AND STONY ISLAND AVENUES.

TO THE HONORABLE, THE CITY COUNCIL OF THE CITY OF CHICAGO.

Gentlemen:

Pursuant to the order of your honorable body of the 29th day of March, ult., directing the Corporation Counsel to institute a search into the records and have a survey made of the locality and report to the council the legal status of 71st street between Cottage Grove avenue and Stony Island avenue, and whether the Oak Woods Cemetery Association is exceeding its charter powers, I wish to report as follows:

1. The "Oak Woods Cemetery Association was organized by Act of the legislature, approved February 12, 1853. Under the provisions of the act the Association was authorized to acquire and use for cemetery purposes not to exceed 160 acres of land near the City of Chicago.

2. Under the Act of March 7, 1867, amending the last mentioned Act, the Association was authorized to own lands for cemetery purposes not to exceed 500 acres; and it was provided, "that no road, street, alley or thoroughfare shall be laid out or opened through their said grounds or any part thereof, without the consent of the directors; nor shall any

corporation now existing, or hereafter created, be authorized to take, hold or possess any portion of said cemetery by condemnation, without such consent."

3. The property first acquired by said Association under the original act, was the Southwest quarter of Section 23, Township 38 North, Range 14, E. This purchase amounted to just 160 acres, the quantity named in the original act.

Since then the Association has acquired under the Act of 1867, approximately 40 more acres east of and adjoining the original purchase, immediately south of 67th street.

4. The main entrance to the cemetery was established and is still maintained on 67th street, and for the purpose of having a street 66 feet wide, the Association dedicated for street purposes the north 33 feet of the 160 acre tract originally purchased.

5. This, however, was not done with the south 33 feet of the tract, and thus it happens that the same is enclosed with a fence, to the center of the section line, and bodies are buried throughout this strip to within 5 feet of the fence maintained by the Cemetery Association.

6. The fact that Dobson's Atlas of Hyde Park, of 1874, seems to show 71st street as of a width of 66 feet is, in my opinion, not sufficient to establish any public rights to the north 33 feet which have been in possession of the Cemetery Association for more than twenty years.

The question then is—What can the City do to open 71st street to its full width of 66 feet?

1. Under the Act of 1867 you may widen said street with the consent of the Directors of the Oak Woods Cemetery Association.

2. Under clause 79 of Section 1 of Article V of the Cities and Villages Act your honorable body has power "to * * * cause cemeteries to be removed, and prohibit their establishment within one mile of the corporation."

It is a well-known principle of the law that all corporations accept their franchises subject to regulation under the police power.

This was held in the case of Concordia Cemetery Association vs. Minnesota and Northwestern Railroad Company, 121

Ill. 199, in which case the railroad company sought to condemn part of the land owned by the cemetery association for right of way.

From the foregoing it appears that two ways are open to your honorable body. It is a matter of legislative discretion which way you decide to take.

Respectfully submitted,

NICHOLAS MICHELS,
Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,
Corporation Counsel.

APRIL 22, 1915.

In Re CLAIM OF W. C. DANNENBERG, FORMER INSPECTOR OF
MORAL CONDITIONS.

HON. JAMES GLEASON, General Superintendent of Police.

Dear Sir:

On March 20, 1915, we received a communication from your department relative to the above claim, in which you state the facts as follows:

“About Feb. 25, 1914, Mr. Dannenberg reported to the Second Deputy Superintendent, his immediate commanding officer, and to myself, that an attempt had been made to bribe him so as to influence him in the discharge of his official duties; and that he had an engagement with the said Harry Cullett to meet him at a specified location on the north side and there receive from him \$500 in currency. This matter was taken up with the Corporation Counsel’s office, and, under instructions from the said office, Dannenberg was ordered by me and by the Second Deputy Superintendent of Police, to conclude his arrangements with Cullett, and to receive from the said Cullett the \$500, and that police officers would be in the vicinity to arrest the said Cullett immediately after he had handed to Dannenberg the \$500 referred to. These arrangements were carried out. Dannenberg received the \$500 and Cullett was arrested on the spot. The case was tried before the Honorable Thomas Scully, then Judge of the Municipal Court of Chicago, and Cullett was discharged on a technicality.”

The money involved in this case is now in the possession of

De Witt C. Cregier, the Custodian of Lost and Stolen Property, and was held by him and is now being held as evidence in the case, in accordance with the terms of Section 1916a of the ordinance reorganizing the Police Department, passed December 30, 1912, as thereafter amended.

It appears that Mr. Cullett denied that he gave the \$500 or any other sum of money to Dannenberg and therefore Cullett disclaims ownership to the money found upon the person of Dannenberg. Because of the disclaimer of Cullett, to the money, Dannenberg, whose connection with the department has since been severed, demands the same from the custodian of lost and stolen property, on the theory that he having had possession of the same next prior to the time the money was turned over to the custodian of lost and stolen property, his right to the \$500 is superior to all persons except the rightful owner thereof.

We cannot concur with the position which Mr. Dannenberg takes in this matter. It must be remembered that at the time the money was turned over to the custodian of lost and stolen property, Mr. Dannenberg was a member of the Police Department of the City of Chicago. It is provided in Section 1916a as follows:

“It is hereby made the duty of all officers and members of the department into whose possession any property seized or taken shall come, to deliver the same at once to the said custodian unless it is wanted for immediate use as evidence in any case, and in that event a report and inventory of same shall be forwarded at once to said custodian.”

It is also provided in said section as follows:

“It shall be the duty of said custodian to keep a record of all property which may be seized or otherwise taken possession of by the department of police of the city; and if such property so seized or taken possession of shall not be claimed by the *rightful owner thereof*, and possession surrendered to such owner within sixty days from the date of the final disposition of the court proceedings in which connection said property was seized or otherwise taken possession of * * * said custodian shall publish, or cause to be published in the official newspaper of the city, a description of said property, together with the date of seizure or the taking possession thereof,

and shall give notice that if such property be not claimed by the *rightful owner or owners thereof* within ten days from the date of such publication, such property will be sold at public auction * * *. The proceeds of any sale or sales so made after deducting the cost of storage, advertising, selling and other expenses incident to the handling or selling of such property, shall be paid by said custodian to the Police Pension Board, to be credited to the Police Pension Fund of the city * * *."

While the money involved in this case is not such property as can be sold at public auction to the highest bidder, it is nevertheless property taken possession of by the Department of Police of the city, and to authorize the custodian of lost and stolen property to turn the same over to any person, such person must establish that he is the rightful owner thereof.

In view of the testimony of Mr. Dannenberg as outlined in your communication to this department, we cannot see how it is possible for him to establish the fact that he is the rightful owner of the money turned over to the custodian.

While the provisions of the Police Pension Act and the ordinance relating to the office of custodian of lost and stolen property contemplate that the proceeds of all sales of lost and stolen property shall be paid into the Police Pension Fund, and therefore a sale of such property is also contemplated, it would be ridiculous to hold that where the property is money a sale is necessary.

We are of the opinion that in these circumstances the custodian of lost and stolen property is authorized to turn over the money to the Police Pension Fund after advertising and posting notice in the manner provided in Section 1916a of the ordinance relating to the Police Department heretofore referred to, excepting that the advertisement and the notice should advise all those who may be concerned that unless the money is claimed within ten days after the date designated in such advertisement and notice the same will be turned over to the Police Pension Fund of the City of Chicago.

Respectfully submitted,

JOSEPH F. GROSSMAN,
Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,
Corporation Counsel.

April 26, 1915.

In re WHEEL TAX ORDINANCE.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

On the 22d inst. the Supreme Court of this state, in the case of *City of Lincoln v. Dehner*, No. 9972, in passing upon the validity of a so-called wheel tax ordinance of the City of Lincoln, which ordinance is similar in form to the Chicago wheel tax ordinance, stated in its opinion the following:

"The ordinance in question is squarely in conflict with section 12 of the motor vehicle law, which prohibits local ordinances regulating the use of motor vehicles like the one owned and used by appellee in this case, and provides that no owner of a motor vehicle, except motor trucks and motor driven commercial vehicles, who shall have obtained a certificate from the secretary of the state and paid the registration fees as provided in section 2 of the act, shall be required to pay any tax for vehicles carrying loads, or any other tax upon the use of any such motor vehicle in excess of the sum of \$20 per annum for vehicles of more than thirty-five horse-power, or to obtain any other license or permit to use or operate the same; * * *"

The motor vehicle above referred to was a pleasure automobile of more than thirty-five horse-power and was not used for commercial purposes or let for hire.

In the case of *Ayres v. City of Chicago*, 239 Ill. 237, in which the Chicago wheel tax ordinance was sustained, the court held that ordinance to be not in conflict with Section 13 of the state motor vehicle law of 1907. In 1911 a new state motor vehicle act was passed, Section 12 of which covers the same subject-matter as Section 13 of the prior act. Both sections contain a provision that "no owner of a motor vehicle * * * who shall have obtained a certificate from the Secretary of State * * * shall be required * * * to obtain any other license or permit to use or operate the same * * *."

In the Ayers case, the Supreme Court held that the Chicago wheel tax ordinance was in effect a tax, and the court at page 246, said:

"It is true that the ordinance provides for the issu-

ing of a 'license' to the owners of vehicles upon the payment of the tax as required by the ordinance, but construing the word 'license' as used in the ordinance, in connection with the general context of the ordinance, it is clear it is used as equivalent to 'tax,' and the issuing of a license to the owner of a vehicle under such ordinance is, in effect, no more than giving a receipt for the annual tax which he has paid."

The Dehner case, *supra*, does not expressly overrule the Ayres case, *supra*, but holds in effect that the changes made in the 1911 motor vehicle law clearly indicate that the legislature intended to take from municipalities such power as they had had to license motor vehicles other than motor trucks and motor driven commercial vehicles.

We have communicated with the city attorney of the City of Lincoln and have been assured by him that that city will apply for a petition for rehearing of this case. However, if this opinion of the Supreme Court stands, it seems that the wheel tax ordinance of this city, in so far as it requires the procurement of a license for motor vehicles, other than motor trucks and motor driven commercial vehicles, is invalid. Therefore, in order that the city may lawfully require a license for such motor vehicles it becomes necessary to secure an amendment to Section 12 of the present motor vehicle law.

We have drafted, and are enclosing herewith a bill for an act so amending said Section 12 that cities and villages may require the procurement of licenses and the payment of a tax for their use as is now provided for by our present ordinance. The only change in the present motor vehicle law made by this amendment is the elimination therefrom of the language which purports to exempt owners of motor vehicles from obtaining any other license or permit to use or operate the same or from paying any other fees than those required by the statute. We are of the opinion that the legislature can amend Section 12 of the motor vehicle law of 1911 so that cities may require the owners of all motor vehicles to procure licenses and pay license fees as now provided by our wheel tax ordinance.

It is highly desirable, if not essential, that a bill amending

Section 12 be introduced at once in the general assembly in order to permit of its consideration and passage at this session of the legislature.

Respectfully submitted,

LORING R. HOOVER,
Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,
Corporation Counsel.

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References are to pages upon which opinions begin.

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